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1 BEFORE THE PUBLIC SERVICE COMMISSION
2 OF THE STATE OF DELAWARE
3 VOLUME 10

4 IN THE MATTER INTEGRATED RESOURCE)
5 PLANNING FOR THE PROVISION OF)
6 STANDARD OFFER SUPPLY SERVICE BY)
7 DELMARVA POWER & LIGHT COMPANY)
8 UNDER 26 DEL. C. SECTION 1007(c))
9 & (d): REVIEW AND APPROVAL OF THE) PSC DOCKET NO.
10 REQUEST FOR PROPOSALS FOR THE) 06-241
11 CONSTRUCTION OF NEW GENERATION)
12 RESOURCES UNDER DEL. C. SECTION)
13 1007 (d))
14 (OPENED JULY 25, 2006))

15 Public Service Commission taken pursuant to notice
16 before Renee A. Meyers, Registered Professional Reporter
17 and Notary Public, at Legislative Hall, Dover, Delaware,
18 on Tuesday, February 28, 2007, beginning at approximately
19 11:23 a.m., there being present:

20 BEFORE:

21 ARNETTA McRAE, CHAIR
22 JAY LESTER, COMMISSIONER
23 DALLAS WINSLOW, COMMISSIONER
24 JOANN CONAWAY, COMMISSIONER
25 JEFFREY CLARK, COMMISSIONER

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1 CHAIR McRAE: Let's take our seats and
2 we will continue. That was a very generous five-minute
3 break; you would not agree?

4 Now, we still have miles to travel
5 today, and I understand our Staff counsel has a conflict
6 that will take him away from us fairly soon, so we need
7 to cover as much as possible.

8 We are now dealing with the now famous
9 Delmarva IRP, RFP Docket. I just think it's important
10 for me to share a few things at the outset.

11 The proceeding today is, essentially,
12 for feedback to the evaluators, which are the four
13 agencies, the Public Service Commission, the Office of
14 Management and Budget, the Controller General, and the
15 Public Service Commission, to actually hear the comments
16 of our consultant and the responses of Delmarva and have
17 an opportunity for question and answer.

18 Among the evaluators and the individuals
19 I have identified, it is not a public comment session.

20 Now, I also thought it might be
21 worthwhile to review the schedule that we have
22 established so that there is clarification as to when the
23 public has an opportunity to participate in proceedings.

24 As you know, there was a press release

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1 that went out that advised that Delmarva and Staff would
2 be hosting town meetings to discuss the evaluation
3 reports, and those town meetings are scheduled on March
4 6, 7, and 8.

5 In addition, the due date of March 23rd
6 is for written public comment on the RFP evaluation
7 reports. And bidders, of course, at that time, also have
8 an opportunity to submit written comments.

9 On April 4th, we have interim Staff
10 consultant report on the IRP to assist the Commissioners
11 and other state agencies in the RFP decision process.

12 Tuesday, Wednesday, Thursday, April 10th
13 through 12th, again, we will have town meetings to
14 discuss Delmarva's integrated resource plan.

15 Also, on Wednesday, the 2nd of May,
16 written comments are due from interested parties and the

17 public with respect to the interim RFP report. Again,
18 bidders will have an opportunity to submit written
19 comments.

20 On Tuesday, May 8th, 2007, the
21 Commission and state agencies that I have identified
22 previously will discuss the preliminary decisions and
23 provide direction to Delmarva Power. That's with regard
24 to the bid selection, if any. And it's not been
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1 determined, at that point, whether the bidders will be
2 allowed to make oral arguments or presentation, but we
3 are a long way from that time and I am sure the agencies
4 will have an opportunity to talk before then.

5 On June 15th, Delmarva will have
6 completed its final bid and negotiations, and they will
7 submit final contracts to the Commission and the other
8 state agencies.

9 On the 19th of June, the Commission and
10 state agencies are to make a final decision and sign
11 related orders in which case the IRP will be revised to
12 reflect whatever decisions are made.

13 Now, I would point out to you that this
14 is, indeed, a proposed agenda, and, as you have seen,
15 this process has been somewhat fluid, so while this is
16 our stated goal, I think you have to bear in mind that
17 there has been no proceeding like this in the history of
18 the Commission, I would dare to say, and that may require
19 adjustments and modification along the way. But for the
20 time being, this is the process that we have set forth
21 and what we are supposed to live by.

22 And with that said, we are going to move
23 on to some matters, preliminary matters before we get to
24 the presentations that I referred to.

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1 The first matter, as I recall, was
2 Mr. Firestone's request with regard to party status.

3 I am going to ask that the parties
4 identify themselves as they come forward, there is a
5 podium here, so that we can have your name for the
6 record. You are welcome to do that. If you want to
7 stand in the back, that also is okay.

8 MR. FIRESTONE: Madam Chair, members of
9 the commission, members of the other state agencies, my

10 name is Jeremy Firestone. I represent myself in this
11 matter.

12 Madam Chair, I would perhaps suggest a
13 slightly different order. If we first address the issue
14 of redactions, I think it may obviate, in part, my motion
15 for access to the confidential documents. So, depending
16 on the Commission's ruling there regarding what
17 information will be made available to the public, I may
18 be willing to withdraw my motion for confidentiality,
19 although I would still like, in any event, my party
20 status to be determined by the Commission.

21 CHAIR McRAE: Well, at this juncture,
22 that's exactly what we are addressing, your party status,
23 in that sequence. Your party status will -- is an
24 overlap to the confidentiality issue, so I would suggest
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1 that we proceed with regard to your party status, which,
2 indeed, does spill into the other area.

3 Let me say, for clarification for the
4 audience, we are speaking here about the Commission's
5 process. It does not bind the other state agencies. We
6 have a process as to how we treat these matters, and this
7 is what's under discussion at this present time, the
8 Public Service Commission's process.

9 MR. FIRESTONE: I will then go ahead and
10 first address my party status.

11 As you know, I have filed a lengthy
12 paper on my party status which sets forth both the
13 history of these proceedings in which I have participated
14 and been before the Commission on at least four or five
15 other occasions.

16 We recently also received a memorandum
17 from the senior Hearing Examiner O'Brien and
18 Administrative Dillard regarding the party status as
19 well.

20 I would start with Rule 21, which, by
21 its term, applies to proceedings which are defined in
22 Rule 2 as any matter having a docket number, and 06-241
23 certainly has a docket number.

24 The Hearing Examiner suggested that
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1 because your initial order, or 7003 did not include an
2 intervention period, that somehow intervention wasn't

3 permitted. I would suggest that when the Commission puts
4 in an intervention period into an order, it is not a
5 grant of authority to intervene. The grant of authority
6 to intervene sets forth in Rule 21.

7 What the Commission does when it puts in
8 a limitation period is it puts on a limitation on
9 intervention. It says, Unless you intervene by this day,
10 then you are not allowed to intervene, just as you did in
11 the related IRP proceedings, the date was just this past
12 February 23rd. There was no period, and, so, at this
13 point, the parties could intervene at any period.

14 As I set out in my written brief, I
15 brought to this Commission's attention both the written
16 motion and then in -- in a little colloquy and discussion
17 with the Commission, that the Staff had indicated that I
18 did not need to formally intervene being an official
19 party in these proceedings, that wasn't before the
20 Commission, and the motion would be shared with all of
21 the bidders which would suggest that everyone was on
22 notice of my intent, desire to be a party.

23 I would ask that this Commission, to the
24 extent it doesn't consider me a party, to now rule sua
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1 sponte, on its own initiative that I am, in fact, a
2 party.

3 I would note that no bidder filed any
4 response to my detailed recitation of how I met the
5 criteria under Rule 21 and neither did the Hearing
6 Examiner.

7 I would ask anyone that objects and ask
8 the bidders now to comment on whether they have any
9 objections to my participation as a party.

10 CHAIR McRAE: Mr. Firestone, if the
11 bidders are going to be -- I will ask, I just want to be
12 clear that you are not conducting the meeting as to who
13 speaks? You are speaking exclusively for you?

14 MR. FIRESTONE: Yes. My apologies,
15 Madam Chair.

16 It was more of a rhetorical --

17 CHAIR McRAE: Very good.

18 MR. FIRESTONE: All of the questions
19 with it merely object to my access to confidential
20 documents, and I think that there has been sort of a

21 mixing of these two issues. I think Delaware case law,
22 as it's set forth in my memorandum, is clear that it's
23 standard to intervene in an administrative proceeding is
24 very low, that the bar is very low, and that even under
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1 the higher bar that would apply to, in my view, to sue, I
2 meet that, and I clearly fall within the zone of interest
3 of house Bill 6, and so I clearly meet the test that
4 would be set up.

5 Anyway, I would ask that the Commission
6 rule distinctly on my issue as a party versus the issue
7 of confidentiality.

8 I don't know if you want me to go on and
9 discuss the confidentiality or if you want to resolve the
10 party status first?

11 CHAIR McRAE: Let's resolve the party
12 status.

13 MR. FIRESTONE: I couldn't hear you.

14 CHAIR McRAE: Let's resolve the party
15 status. And to show that great minds think alike, I am
16 going to accept your suggestion that we also hear from
17 the bidders on this matter. And if each party would
18 identify himself or herself for the record, that would be
19 appreciated.

20 MR. INSKIP: Madam Chair, Commissioners,
21 good morning. My name is Gregory Inskip and I am here
22 today for Conectiv Energy Supply.

23 As the Staff said in its February 23rd
24 memorandum, and as Conectiv said in an earlier submission
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1 to the Commission, there are two rules that govern -- two
2 Commission rules that govern access to confidential
3 information.

4 One is Rule 10, which, basically,
5 governs the Commission's response to Freedom of
6 Information Act requests that go to documents in the
7 files one way or the other of the Commission.

8 The other rule is Rule 11 which Conectiv
9 believes, and the Staff memorandum of February 23rd can
10 state it, really governs formal litigated proceedings.
11 And Professor Firestone asked the Commission, for the
12 first time, I think, a few minutes ago, to separate the
13 issues of his access to confidential information and his

14 status as a party.

15 But, really, what he is trying to do is
16 end run around Rule 10 which governs the public's right
17 to access to Commission records and get special treatment
18 as if he were a formal litigant under Rule 11 because
19 it's Rule 11 that gives parties rights to other parties'
20 confidential information upon execution of an appropriate
21 confidentiality order.

22 But as I think Hearing Examiner O'Brien
23 has noted in an email back in January, this is just not a
24 formal litigation proceeding. That's yet to come. This
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1 is more like a business docket to take -- to supervise
2 Delmarva taking in the RFPs and everything that involves.

3 Conectiv's confidential information
4 contained in its bid was not submitted to this Commission
5 as a litigation document or otherwise. It was submitted
6 to Delmarva Power. And this Commission Staff and
7 consultants, quite properly, got access to that because
8 they have important supervision of the RFP process to do.

9 But that -- that does not make it a
10 litigation document. That does not make Conectiv a
11 litigation party. And Rule 11 just doesn't apply.

12 And Professor Firestone is not a party.
13 He concedes he hasn't intervened. The Hearing Examiner
14 said there are no formal parties in this case. And if
15 push comes to shove and he had moved to intervene under
16 Rule 21, I submit the Commission would have had a good
17 basis to deny that motion because Rule 2 defines party as
18 someone having a direct interest. And his interest -- I
19 mean, he has, as I think the Staff said in its memo, very
20 valuable and intelligent comments to make, but that is
21 not the standard for being a party.

22 The Commission needs to have a little
23 bit of a gatekeeping function, or, otherwise, you might
24 have 10,000 parties who have every bit as much of a right
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1 to be here and participate and get NRG and Bluewater
2 Wind's and Conectiv's confidential information as if it
3 had been actually -- as if Staff would in a rate case.
4 And I submit that that's unworkable.

5 More importantly, the Commission rules
6 have made that judgment for you already. Thank you.

7 CHAIR McRAE: Thank you, Mr. Inskip.

8 Other bidders who wish to be -- speak to

9 this?

10 Mr. Muller, you, apparently, were not
11 here when I spoke about the fact that this proceeding is
12 not for public comment.

13 MR. MULLER: When this document was
14 passed, it was announced that if you wanted --

15 CHAIR McRAE: Let me just say this
16 before you make your comments: Prior to your arrival, I
17 went through the entire schedule of this docket, speaking
18 specifically to when public comment would be permitted
19 and when it was not. You were, unfortunately, unable to
20 be here in time for that, but the transcript, of course,
21 will be available at some time in the future so that you
22 will be able to see that all of that was stated.

23 MR. MULLER: I am not here to offer
24 public comment. I am here to speak as a participant in
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1 Docket 06-241. The Commission commenced that docket and
2 made clear, as we all know, that people could participate
3 without formal intervention. We have been intervenors in
4 Public Service Commission proceedings and know the
5 difference between being an intervenor and not being an
6 intervenor. It was the Commission that chose to address
7 the docket in this way. And since we have participated
8 since the beginning, it's our view that we have the same
9 right to comment as any other participant in that docket.

10 CHAIR McRAE: Your comments have been
11 noted, Mr. Muller, and I will continue. Right now, I see
12 Mr. Houghton at the mic.

13 MR. HOUGHTON: Madam Chair, members of
14 the Commission, Michael Houghton for the firm Morris,
15 Nichols, Arsht & Tunnel for NRG.

16 I will be brief. We have a lot on the
17 agenda today. NRG has seen the memorandums and the
18 positions stated by Staff with respect to the party
19 status for Mr. Firestone. We agree with that position.
20 We essentially agree with virtually all of the comments
21 that have been made by Mr. Inskip on behalf of Conectiv.
22 I won't parse through what we might have slight
23 disagreement with. I don't think they are substantial.
24 Thank you.

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1 CHAIR McRAE: Very fine. Yes.

2 MR. McGONIGLE: Madam Chair, I am Tom
3 McGonigle from Bluewater Wind. I will also be brief.
4 Bluewater filed a motion in opposition to Mr. Firestone's
5 motion. We stand by that motion. We also concur with
6 the Staff memorandum from February 23rd.

7 CHAIR McRAE: Also, we have the Public
8 Advocate's office.

9 MR. CITROLO: Thank you, Madam Chair. I
10 am -- actually, I am going to defer mostly to Staff
11 counsel. I am a little confused. I did not believe we
12 were here to determine the party status of Mr. Firestone
13 or whether or not he could execute a confidentiality
14 agreement, new confidential information, and with regards
15 to the overall confidentiality, it's a decision or
16 finding of fact that this Commission would make with
17 regards to the bidders' proposal of redacting
18 information.

19 Now, whether or not the redactions are
20 reasonable, not necessarily whether Mr. Firestone,
21 himself, has access to confidential information, it's
22 whether or not the people that deemed the information
23 confidential, whether or not you believe it's
24 confidential.

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1 And, once again, with Mr. Geddes'
2 schedule, I will defer to him for the rest of the
3 comments. Thank you.

4 CHAIR McRAE: Mr. Geddes.

5 MR. GEDDES: Madam Chair, members of the
6 Commission, I will sit unless you would like me to go to
7 the podium? Is this all right or would you like me to
8 stand since all of my compatriots did?

9 CHAIR McRAE: It's your choice. I think
10 you are a better target, if you will, if you stand.

11 MR. GEDDES: I wouldn't want to be shot
12 at by being a potential target.

13 Members of the Commission and other
14 agencies, this issue may seem, on the surface, as being
15 maybe a technical one, but, actually, it's a lot more
16 than just whether Mr. -- Professor Firestone should be a
17 party or participant in this proceeding.

18 The rules that everyone is citing are
19 interesting rules, but as Mr. O'Brien and Dillard pointed
20 out, they were promulgated in 1999, long before this
21 Commission, the PSC, and the other state agencies got
22 involved in the RFP process that we are going to be
23 spending the major part of the day discussing.

24 And like many good lawyers, sometimes we
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1 attempt to engraft, if you will, meaning to rules that
2 are not intended to have those meanings. If you look at
3 the rules, and, specifically, Rule 7, you will see the
4 type of process that was set out in the rules at the time
5 that they were prepared. I will remember back in the
6 '80s, we didn't have any rules at all. And, so, there
7 was an attempt, in the '90s, to create some process, if
8 you will, to make the agency work more efficiently.

9 But if you look at the rule
10 specifically, Rule 7, you will see that it refers to
11 applications, petitions, complaints, answers, motions,
12 briefs, memoranda.

13 Clearly, that's not the type of process
14 we have today. That type of process is referred to as a
15 contested process. This is a bidding process. It is a
16 completely different animal. And under Rule 1, to the
17 extent that we want to cite to rules and to processes
18 that really don't apply here, the Commission can deviate
19 from its standard rules of procedure if it feels it
20 appropriate.

21 Now, as I said on the 6th, when this
22 issue first came up and we deferred it, because there was
23 some late filed materials that Professor Firestone wanted
24 to refer to, when I said I was discussing whether this
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1 was the type of process that Mr. Firestone could be a
2 party, I was trying to establish that the Commission, in
3 its initial orders, bent over backwards to make sure that
4 everyone who had an interest in the process would have a
5 forum to speak. And there was a meeting here on the 18th
6 of August. There were other opportunities to comment.
7 But all of that participation, and, in fact,
8 Mr. Firestone has filed several motions, does not engraft
9 upon him any particular status because the only way that
10 party status is permitted is pursuant to the rule. And

11 that clearly has not been done here.

12 There is not a party to this process.

13 Even the bidders are not parties to this process. They
14 are participants. They have different roles. The
15 bidders are not entitled to see the confidential
16 information of the other bidders. And I suggest to you
17 that based on the reasons that Mr. O'Brien pointed out in
18 the memo, there are significant reasons why the public
19 should not be entitled to that as well.

20 So I think it is a little specious to
21 suggest somehow by our process to date, that we have
22 engrafted onto the participant some status that this
23 Commission has not specifically or formally granted them.
24 They should all be treated as participants. And they

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1 have certain roles, if you will, in this decision making
2 process, but they are not decision makers. You are the
3 decision makers, and it is your process. And you also
4 have responsibilities to protect confidential information
5 of the bidders who submitted this material with the
6 understanding that it be kept confidential. And one of
7 the aspects of that is to limit the access, no pun
8 intended, to that material to those people who need to
9 make the decisions, and that is you folks up there, not
10 people back here.

11 So, I think for all those reasons,
12 Professor Firestone and others have certainly a role in
13 providing comment in accordance with the schedule that
14 Madam Chair laid out and to give us their opinions based
15 on the information that is released to the public, and
16 those opinions will help shape the decisions that you
17 make, but that does not mean that they have some
18 entitlement to be parties in this proceeding in a formal
19 way which would mean that they would be able to take
20 discovery, cross-examine witnesses, and make this into a
21 contested proceeding, in which, if that was allowed, this
22 would never end.

23 Thank you.

24 CHAIR McRAE: Thank you. Commissioners.

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1 Do you have comments? Commissioner Clark.

2 COMMISSIONER CLARK: I have read through
3 Professor Firestone's motion and spent some time thinking

4 about this. I mean, it seems like what we are doing is
5 reviewing an RFP and making a decision on a bid process
6 which is essentially an executive function. It's not a
7 judicial function where there would be parties who would
8 litigate the matter.

9 Really, if you take a look at the
10 docket, I mean, where it started, I think was, I mean,
11 whether it be commissioned in this analysis or group of
12 state agencies, I mean, if the actual setting up of the
13 RFP was more legislative maybe than us now who are making
14 an executive decision, and I don't -- I, for one, can't
15 rule sanction granting a party status to an individual in
16 this matter.

17 You know, had this -- and, really,
18 Professor Firestone, last fall, had some conversation
19 with Staff or e-mails with Staff talking about, you know,
20 the fact that he considered himself to be a party. Had
21 he brought this to a head then, we would have had the
22 consideration that we are giving his motion now, and as
23 far as I am concerned, I would have, you know, if it was
24 a formal decision was asked then, I would have made the

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1 same one that I am making now. I, for one, and I don't
2 know how other agencies think or how other Commissioners
3 think.

4 CHAIR McRAE: This is the Commission's
5 process. The agencies may very well have --

6 COMMISSIONER CLARK: Well , I guess just
7 for -- we are all sitting here.

8 CHAIR McRAE: They are certainly welcome
9 to chime in.

10 COMMISSIONER CLARK: As far as I am
11 concerned, it's more of an executive function. It's not
12 a contested proceeding and I would advocate that
13 Professor Firestone not be admitted.

14 MR. FIRESTONE: Madam Chair, may I
15 briefly --

16 THE CHAIR: No, not at this point,
17 please. I'd like to hear from, if there are additional
18 Commissioners and the other agency representatives, if
19 they want to participate, and I actually did not state
20 for the record, but would like to do so now, who
21 specifically they are. Since this initial process was a

22 Commission-oriented function, I didn't do that. But we
23 have Mr. Scoglietti from OMB. We have Jen Cohan from the
24 Controller General's Office, and Bill Cherry from DNREC.

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1 They are certainly welcome to add comment in this
2 process. And Commissioners may also feel free to speak.

3 MR. CHERRY: For the record, it seems to
4 me this issue of party status is most clearly an issue of
5 business. It turns on the rules and regulations of the
6 Commission. I move that my agency, for the Department of
7 Natural Resources, we will not be voting on this motion.

8 MR. CITROLO: Madam Chair, I need to ask
9 a point of clarification. I am still confused. My
10 understanding is Mr. Firestone's motion for
11 confidentiality agreement was before the four state
12 agency review quasi Commission. The FOIA requests are
13 before the Commission.

14 CHAIR McRAE: Yes, that's true.
15 Although, just now, Commissioner Clark raised the point
16 that other agencies' comments were welcome. Right now,
17 we are dealing with -- the FOIA request is coming, but
18 that's not what -- there is some overlap, but that's not
19 the issue. It's the Commission's process that's in
20 discussion and Mr. Cherry wanted to note for the record
21 that it's not involved.

22 MR. CITROLO: This is the motion for
23 confidentiality, which, my understanding from the memo,
24 was not to consider whether Mr. Firestone is a party or

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1 not a party.

2 CHAIR McRAE: Well, confidentiality,
3 while there is some overlap on this party in discussion,
4 that is yet to come, Mr. Citrolo.

5 The issue that we are speaking to is
6 what had been covered in the Staff memo that you received
7 with respect to this -- the party issue, and the
8 Commissioner Clark's comments were specific to that. And
9 I -- I would add my own in that regard. I do think, out
10 of an abundance of sincere desire to make sure the public
11 was not excluded, you know, the Commission has allowed
12 various opportunities for public input. And I think, in
13 the course of that process, we have gotten caught up with
14 form over substance, and I am referring specifically to

15 some of the information contained in Mr. Firestone's
16 memo.

17 He seemed to assume he could, because
18 something was labeled a motion or an order or whatever,
19 that that established a litigation posture in a
20 proceeding, when, in fact, it was always my understanding
21 that the -- the intent of the Commission was as
22 appropriate to allow the public to have opportunity for
23 input and comment.

24 I certainly was not thinking of this

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1 matter in terms of a litigation process. I don't,
2 frankly, don't think it's met that even at this juncture,
3 and I regret that some confusion may have arose in the
4 minds of some people out of that, but, clearly, I do not
5 believe it was ever the intent of the Commission to
6 establish that party structure that we are hearing about
7 now.

8 I would also note that Mr. Firestone has
9 gone to a fairly extensive effort to share his background
10 in terms of your legal foundation as well as other
11 exposure through administrative agencies which certainly
12 creates an issue as to, in my mind, at least, why there
13 would be reliance on a Staff memo. I mean, I think the
14 process is very clear, if we were talking about
15 intervention, that it wouldn't be a Staff decision, and I
16 am kind of looking at your background and also struggling
17 with that conclusion.

18 But at the end of the day, I think that
19 the memo that was referred to by Staff, for me,
20 summarizes fairly well why I am not inclined to
21 acknowledge party status of this matter.

22 Commissioner Clark.

23 COMMISSIONER CLARK: Madam Chair, just,
24 really, more of an academic issue but something to

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1 consider about, they might even help us to go on, is
2 right now, this is a standing before the various state
3 agencies, and there is a petition for a motion to grant
4 intervening status in that proceeding. I do think it's
5 something that we, as a group of state agency, need to
6 decide.

7 Now, each, you know, recognizing that

8 the PSC, DNREC, Budget Office, all have different FOIA
9 procedures they may want to amend, when we are dealing
10 actually with letting a party make a decision about
11 whether to grant party status for somebody, I think it's
12 something that all of us need to maybe reconsider
13 addressing because that's the due process that was the
14 procedure before.

15 CHAIR McRAE: Well, as I understood your
16 comments, we are talking about an executive proceeding.
17 I am not sure that that issue would ever be an
18 appropriate one in this proceeding.

19 COMMISSIONER CLARK: If there is an
20 executive proceeding, Madam Chair, what you have is,
21 essentially, poor decision that could make that record
22 decision. That is my point. And if we should deny
23 status to someone requesting status and someone, I think
24 it should be something that's realized in party status.

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1 CHAIR McRAE: Versus the question of our
2 process right now?

3 COMMISSIONER CLARK: Well, I mean,
4 certainly, Madam Chair, and this is something that's
5 going to have to be addressed by default, I mean, I think
6 it's going to give -- my suggestion would be to go
7 forward with the Commission proceedings. I mean, we are
8 -- you are here chairing, chairing the proceeding, and
9 that seems to be how we are addressing it, so I just --
10 that's my thoughts on this thing.

11 CHAIR McRAE: Well, I am not exactly
12 clear as to what context to put that in for purposes of
13 whether this is a party or not in proceeding. I think
14 DNREC has made clear that it does not see itself as part
15 of that process, that decision.

16 Commissioner Winslow.

17 COMMISSIONER WINSLOW: Madam Chair, I
18 think it's pretty clear, with respect to the party
19 issues, I think we have discussed it pretty thoroughly,
20 we have had input from a lot of people, so I would move
21 that Mr. Professor, Dr. Firestone's motion to become a
22 party, if that's what he wants, be denied.

23 CHAIR McRAE: Is there a second on it?

24 COMMISSIONER CLARK: I will second the

0888

1 motion.

2 CHAIR McRAE: Is there a question of
3 readiness on the vote? If --

4 MR. CITROLO: I have a question, Madam
5 Chair.

6 CHAIR McRAE: I am actually speaking to
7 the Commissioners at this point.

8 MR. CITROLO: I am not aware of any
9 motion for intervenor status. I am aware of a motion for
10 an entire body for a protective order of which perhaps an
11 issue within that is party status but I am unaware of a
12 motion for party status.

13 CHAIR McRAE: For one, I did not
14 recognize you, Mr. Citrolo, but, secondly, there was,
15 indeed, such a request for party status, perhaps at a
16 meeting which you did not attend maybe. There was,
17 indeed, a motion by Mr. Firestone in that regard.

18 MR. CITROLO: And I wanted a ruling on
19 that.

20 CHAIR McRAE: That's what we are talking
21 about now. It was deferred.

22 MR. CITROLO: I apologize for the
23 clarification.

24 CHAIR McRAE: At this juncture, we have
0889

1 on the floor a motion to deny the request for party
2 status. All in favor?

3 THE COMMISSION: Aye.

4 CHAIR McRAE: Again, I am not sure --
5 all in favor.

6 THE COMMISSION: Aye.

7 CHAIR McRAE: Opposed? Thank you.

8 Now, the next matter before us is the
9 FOIA request of, I think, The News Journal. And I
10 believe Mr. Geddes is going to address that.

11 MR. GEDDES: Madam Chair, members of the
12 Commission, and other agencies, at the February 6th
13 meeting, the issue of redactions came up, and there was a
14 long discussion as to what the appropriate procedure
15 should be with regard to questions as to whether some of
16 the materials that have been removed from the bids have
17 been appropriately removed.

18 And I believe most of the bidders agreed

19 to take a second look at those materials, at the
20 Commission's suggestions, and to try to narrow the
21 redactions so that they only redacted what they thought,
22 upon second review, was confidential information.

23 And, in fact, one of the bidders was
24 asked to do it a third time and complied with that
0890

1 request as well.

2 And, so, now, the materials that have
3 been put up on the web site, in connection with the bids,
4 presumably, from the bidders' point of view, include only
5 the information that can be made public. All the other
6 information must remain confidential.

7 As a result of the Commission's
8 concerns, general concerns about redacted material,
9 internally, Staff undertook an investigation of the
10 redactions to try to determine whether additional
11 materials should be turned over to the public. And in
12 the memo that's been referred to before, by Mr. O'Brien
13 and Ms. Dillard, they went through and made some
14 recommendations with regard to what additional materials
15 should be, in their opinion, produced.

16 If you look at page 3 of that memo, you
17 will see a discussion in the first full paragraph
18 regarding levels of air emissions from the proposed
19 facilities and the opinion that, at least with regard to
20 two of the bidders, most if not all of that information
21 was disclosed in the second round of review, but NRG was
22 not persuaded that that material should be disclosed.

23 I think it's Staff's position that at
24 least the Form H should be disclosed for all of the
0891

1 bidders, and that was a recommendation that Staff was
2 making to you, and I am sure you want to hear NRG on its
3 position with regard to this and perhaps the other
4 bidders as well.

5 And then if you go to the bottom of page
6 3 and over to the top of page 4, you will see three other
7 items that, based on the review that Staff is suggesting
8 should be released, and that has to do with a press
9 release, a Moody's report, information that Conectiv
10 thought was confidential, and some employee names.

11 Now, that was the review that was done

12 by Staff on a short -- in a short time period based on
13 the subsequent redacted materials.

14 I think, as Staff also points out, that
15 if there was a FOIA request and if it is still pending,
16 and I am not sure personally whether or not that's
17 correct or not, but assuming that it is, then in order to
18 comply with that, a line-by-line review of all that
19 material would need to be done, and it is on the
20 Commission and the other agencies to perform that review
21 if the request is still pending. And we are proposing
22 that that be done expeditiously if that is still the
23 position of The News Journal, that they want that type of
24 review to be performed.

0892

1 But in the interim, based on the last
2 meeting and the various efforts made by the participants,
3 Staff is recommending that this type of information be
4 disclosed and we would recommend that it be disclosed by
5 the end of the week so it's available to the public for
6 the public meetings that are going to be held next week.
7 And we will await further instructions as to whether the
8 more, I believe Mr. O'Brien referred to it this morning
9 as granular review needs to be done, it almost sounds
10 painful, but line by line through all of this material.
11 I believe that's Staff's position.

12 CHAIR McRAE: And your recommendation is
13 the specific items that were addressed be released versus
14 the granting, at this juncture, and the Commission needs
15 to decide that in addition to what we do --

16 MR. GEDDES: That is correct.

17 CHAIR McRAE: -- with those two items?

18 Is there a representative from The News
19 Journal present? Do you want to comment on the status of
20 the FOIA? And would you identify yourself?

21 Excuse me, Mr. Myers.

22 MR. MYERS: Just to complete the factual
23 record, Mr. Nathan is appearing here in response to a
24 Freedom of Information letter that was filed with the

0893

1 Commission last Tuesday where they request access, in
2 electronic version, to all pages of all the bids without
3 any redactions. That's triggered a FOIA request that
4 Staff sort of rolled into the Commission's independent

5 decision -- that's triggered the FOIA request the
6 Commission Staff has rolled into the Commission's
7 independent decision to review the redactions that it
8 articulated in its last meeting. That's the FOIA
9 request, the contents that we are looking at now.

10 The request was made by Mr. Montgomery.
11 Mr. Nathan is here.

12 CHAIR McRAE: Fine, since you are up.

13 MR. NATHAN: I am Aaron Nathan, a
14 reporter with The News Journal, and I don't usually do
15 this. I will make this real brief. The News Journal
16 believes that the process of redacting documents should
17 have been done by the state, not the lawyers for the
18 organizations.

19 The News Journal filed its initial FOIA
20 request in two subsequent filings. These are all in the
21 record. We believe critical information was kept from
22 public scrutiny. If this is a public matter, then the
23 public needs as much information as possible to make an
24 informed decision, and they ought to have the opportunity

0894

1 to review it.

2 On the matter of such widespread public
3 interest, public disclosure matters should be built into
4 the state's planning process. We seem to be hurrying at
5 this point to get this done.

6 Thank you.

7 CHAIR McRAE: Commissioner Winslow.

8 COMMISSIONER WINSLOW: Thank you, Madam
9 Chair. No one is here reporting on your presentation?

10 MR. NATHAN: That would be me.

11 COMMISSIONER WINSLOW: That's a very
12 envious position to be in.

13 MR. NATHAN: Thank you.

14 COMMISSIONER WINSLOW: I don't have any
15 questions for you, but you obviously understand, The News
16 Journal understands that there are certain laws in the
17 state that we have to abide by regarding copyright and
18 trademark and things of that nature; correct?

19 MR. NATHAN: Correct.

20 CHAIR McRAE: You don't expect us to
21 preempt that; you expect us to follow that law and give
22 you the results of your request; correct?

23 MR. NATHAN: Yes. I mean, we think the
24 laws of the state ought to be reviewing the documents and
0895

1 not just taking these redactions right from the companies
2 and check X. I mean --

3 COMMISSIONER WINSLOW: In that regard, I
4 am very glad because then you will understand if you
5 don't rush that review and don't give them to you
6 quickly, you will be understanding because we don't want
7 to rush through it; correct?

8 MR. NATHAN: I am sorry. I don't
9 understand.

10 COMMISSIONER WINSLOW: It's going to
11 take some time to do that. The materials are very
12 voluminous.

13 MR. NATHAN: Yes.

14 COMMISSIONER WINSLOW: It takes time, so
15 we are not going to rush it, so you will be patient with
16 us; right?

17 MR. NATHAN: You are the government.

18 CHAIR McRAE: I don't know. We are
19 sitting in Legislative Hall. We ought to clarify we are
20 not trying to take over the operation. We are an agency
21 of the government.

22 MR. NATHAN: Nor are we.

23 CHAIR McRAE: Okay. Now, I don't know
24 that this rose to a FOIA request, but I do know that
0896

1 Mr. Firestone did also raise comments about disclosure of
2 confidential information.

3 MR. MULLER: Madam Chair, may I go on
4 the record?

5 CHAIR McRAE: I recognized
6 Mr. Firestone.

7 MR. MULLER: I hope that the Chair
8 recognizes me also. I have something -- I have an
9 involvement in this matter.

10 CHAIR McRAE: Mr. Firestone.

11 MR. FIRESTONE: Madam Chair, members of
12 the Commission, members of the state agency, thank you
13 for your time and your indulgence.

14 Just following up on what Mr. Geddes
15 said, NRG filed their -- made their third filing. I

16 would submit that the first filing was strike one, the
17 second filing was strike two, and it has now struck out.

18 NRG, in its letter, said that it has
19 attempted to follow the overall approach used by
20 Conectiv Energy, and they did in some regards and didn't
21 in other regards. They did follow the process, if you
22 look at the redacted documents, of tying the comments to
23 their cover letter; the difference being that Conectiv
24 broke theirs up, and this is in their letter of February
0897

1 16th, into two broad categories, which they call
2 paragraph three and paragraph four, and then they broke
3 it up into -- each of those into about four or five or
4 six subcategories and then put specific pages as to which
5 subcategory applied so we would know the basis for the
6 redaction.

7 In contrast, NRG's letter breaks it up
8 in similar fashion. It has section one to section two
9 and it has A, B, C, D under each, but it doesn't provide
10 page references.

11 So, when you look at a page, and it
12 appears that there is many examples, this is page 21 by
13 the text, also called page 39 by their redaction stamp,
14 there are essentially two lines redacted from the entire
15 page. And it says, "Support for this redaction is
16 provided in paragraphs No. 1 and 2 of the February 26th
17 letter."

18 That's essentially saying that it is
19 covered generically under the letter which is essentially
20 saying, We are not providing you anymore guidance than we
21 provided you in your last letter because this concludes
22 all 1A, B, C, D, 2A, B, C, D, and we don't know what the
23 basis is.

24 So, I would submit that although NRG has
0898

1 obviously made efforts and has moved the process forward
2 since its last non-effort at explaining the basis for its
3 redactions, it still leaves the public way short.

4 Their emission reductions are based
5 under something called, broadly referred to as "price
6 related/commercial information." And no one knows what
7 the real basis for anything is. And I would submit that,
8 really, for anyone to be able to make an intelligent

9 decision for the same Hearing Examiner, what the NRG
10 submitted is not sufficient as far as basis. And I don't
11 know what this Commission should do. I don't necessarily
12 agree with the Staff memo of a week ago or so that you
13 should just go ahead and disclose all the confidential
14 information. I wouldn't agree with that as an
15 appropriate sanction. I don't think you should go
16 disclosing NRG's confidential information, but something
17 has to happen so that the public and the Hearing Examiner
18 is able to decipher what the basis of these claims are.

19 Thank you very much.

20 CHAIR McRAE: Mr. Muller, I do not
21 recall your making any specific request with respect to
22 documents in this proceeding which -- and these are the
23 parties that I had -- I am using this term very
24 generically and loosely before I end up with 60 other

0899

1 parties in this room, so I will say "the people" so that
2 we don't go awry. So, you know, I will allow you to
3 comment briefly, but these are people that are here who
4 have specifically submitted requests with respect to
5 information. And you do not really fall in that
6 category.

7 It is also not fair to the other members
8 of the public who are present when I have announced this
9 is not a public proceeding.

10 So, with that background, I would ask
11 you to briefly state what your point is.

12 MR. MULLER: Madam Chair, I have made a
13 request to DNREC for this information under their FOIA
14 regulations. That was made last week. I received a non-
15 -- what I would consider to be a non-responsive reply
16 from DNREC's deputy secretary David Small telling me that
17 this matter was being considered by the Public Service
18 Commission. Earlier, you observed that the four agencies
19 had different FOIA criteria, which is my understanding
20 also, but I will --

21 CHAIR McRAE: Let me just clarify. If I
22 said that, I misspoke. They may have different
23 proceedings or processes to how they handle FOIA, and at
24 this present time, it's the Commission speaking to how it

0900

1 handles it. I mean, not DNREC, the other agencies.

2 MR. MULLER: Quite so, but,
3 nevertheless, the response that I received from DNREC was
4 essentially a reference to the Public Service Commission,
5 so I would like, at this time, to ask DNREC's
6 representative, in the presence of the Commission, how it
7 intends to respond to our requests.

8 CHAIR McRAE: Well, very fine.

9 MR. CHERRY: Thanks for the opportunity
10 to elaborate on that, Alan.

11 MR. MULLER: You are quite welcome.

12 MR. CHERRY: Unlike the last issue on
13 party status, I do believe that DNREC and the other
14 agency, I will speak for DNREC, has a role to play in
15 this issue of FOIA, has a role to play in what's redacted
16 and what is not redacted, and I intend to vote on this
17 issue.

18 With respect to your FOIA request, which
19 I do recall seeing, I'd like to think that all four
20 agencies are going adhere to the Freedom of Information
21 Act, a state law, that will dictate how the information
22 that's been submitted to us is released.

23 Now, it seems to me I heard, and
24 probably will hear more about, I forget the word that was

0901

1 used, but a line by line review --

2 COMMISSIONER WINSLOW: Granular.

3 MR. CHERRY: A granular review of these
4 bids and I think that's in keeping with FOIA, I am
5 anxious to see the results of that and ask Staff, or
6 whoever is going to do that review, to do it as quickly
7 as possible because next week there are going to be some
8 public hearings on this issue.

9 I might also say that Staff, with the
10 Attorney General's Office assistance, has opined on --
11 maybe not with the A.G.'s Office assistance, but has
12 opined on the release of information relating to
13 emissions from the NRG facility. And I very much agree
14 with Staff's position on that and would hope that, by the
15 end of the week, that we would see that and I presume we
16 will be voting on that shortly.

17 MR. MULLER: If I may, our request was
18 specifically invoking DNREC's FOIA regulations which were
19 adopted after public notice and are an enforceable

20 administrative regulation of the state of Delaware.

21 And --

22 MR. CHERRY: I am suggesting to you that
23 we will be reviewing your request in light of this
24 combined state agency process that the legislature has
0902

1 given us, with, if you will, an overlay of DNREC's
2 regulations governing FOIA. We will do FOIA and it's
3 just going to take some time.

4 MR. MULLER: How much time? Do you have
5 a timeline in mind?

6 MR. CHERRY: I guess we will talk a
7 little bit more about this granular review and how long
8 it will take. If the emissions data is released post
9 haste, perhaps the need for granular review is slightly
10 diminished in time, although it needs to be done and it
11 needs to be done in a timely fashion. I can't sit here
12 and tell you how long it's going to take.

13 MR. MULLER: I will just end by saying
14 that our request was not limited to emissions data, but,
15 rather, was for all of the information redacted from the
16 application.

17 MR. CHERRY: I understand. And my
18 expectation is that the Staff review, and the folks that
19 are looking at this, and who are trained under the
20 Freedom of Information Act, will get it done as quickly
21 as possible, at least whatever is releasable under FOIA.

22 MR. MULLER: You are going to do that in
23 accordance with DNREC's regulations or not?

24 MR. CHERRY: We will.

0903

1 MR. MULLER: Thank you.

2 CHAIR McRAE: Very fine. If we can move
3 on, we also have the Public Advocate's Office speaking on
4 this matter, which is the FOIA request.

5 MR. CITROLO: Madam Chair, just to be
6 clear, is this agenda item 7B on the agenda?

7 MR. MYERS: Yes.

8 MR. CITROLO: At this point in time, if
9 we are speaking specifically to agenda item B, we are in
10 agreement with the Staff position that Mr. Geddes
11 outlined. Having said that, we -- our comments call to
12 the fact that we went through this twice already with

13 regards to confidentiality, that is bids for supply, and
14 although our agency, at that time, the Division of Public
15 Advocate, started out advocating for full transparency,
16 we were persuaded, during the SOS bid process that's in
17 place now, that a period of time probably served the
18 public interest better than the alternative, which would
19 have been not receiving any bids buying energy at the
20 spot market. And, at that time, the Commission agreed,
21 as it recalled, we had a 30-day blackout period, we
22 ultimately reduced that to 21 days, and I think that's
23 still consistent with what Mr. Geddes has represented to
24 you today, that there is going to be some level of

0904

1 transparency that's required to preserve public interest,
2 so, in fact, we get bids and have options to evaluate,
3 while, at the same time, obviously, some of the things
4 that I did refer to should be released forthwith to the
5 public.

6 Thank you.

7 CHAIR McRAE: At this point, I will ask
8 the bidders to offer comments if they so choose. And I
9 am assuming that you have seen the memo, the Staff memo
10 that's being referred to here? I see Mr. Houghton
11 representing NRG. If there are others, you can identify
12 yourself, Mr. Inskip after that, and is there anyone else
13 from the bidder's side? Mr. Houghton.

14 MR. HOUGHTON: Madam Chair, if I may,
15 and if I may stay here, since I have the collection of
16 paper around me, it may be easier, I don't mind being a
17 target like Mr. Geddes, well, maybe a target like
18 Mr. Geddes.

19 I'd like to specifically address the
20 Form H issue which is the first full paragraph of page 3
21 of the Staff memorandum.

22 With respect to Form H, we did, in the
23 most recent submission made yesterday at about 11:00 with
24 the Commission, which was a third extensive five-day

0905

1 review of everything we had previously submitted, and
2 consisted of the release of more than 300 additional
3 pages of information, not because we were lax in what we
4 did originally, but, frankly, in the last ten days, as
5 the vendor information has sorted out, certain choices

6 had been made and publicly announced by NRG, some
7 information, some significant amounts of information
8 previously redacted no longer needed to be redacted.

9 But with respect to Form H, in
10 particular, there was some modest additional amounts of
11 information that were, in fact, publicly available as a
12 result of the process last week and over the weekend, but
13 there are additional pieces of information that continue
14 to be redacted. Why? Is it because we don't want to
15 release to the public specific information on air
16 emissions and environmental impact? No, it's not.

17 And in the re-redaction that we did over
18 the weekend and last week, there is significant
19 historical information with respect to emissions for the
20 existing Indian River facility which are now available
21 which were not available before because we thought it was
22 appropriate to provide and facilitate access to that
23 information.

24 This information we provided goes to
0906

1 emission rates on primary fuel and emission rates on
2 secondary fuel, and they do provide a specific detail
3 which disadvantages NRG as it moves forward in
4 negotiating terms and conditions with potential vendors
5 as to contractual performance standards and the like,
6 they really go to the heart of both pricing and structure
7 of our transaction, and that really relates to both
8 areas.

9 You can see, on the form, maximum
10 permitted permittable annual capacity factor, that we
11 state, with respect to the primary fuel, a 100 percent
12 capacity which tells you it's going to be a significant
13 part, and that with respect to the secondary fuel was
14 2.7, which is a diminimous, frankly, part of the overall
15 ITC proposal.

16 But in both categories, with respect to
17 not only vendors but also competitors, there is a way to
18 reverse engineer these percentages into pricing
19 information and determination as to how we tend to
20 structure the deal and what some of the proprietary cost
21 factors would be.

22 What I would like to do, I have given
23 that sort of broad overview, but with respect to more

24 particular information, I'd like to ask my client,
0907

1 Caroline Angooley, who is sitting next to me, who is the
2 senior vice president for the northeast region of NRG, to
3 address the question that is put squarely before you,
4 which is: Why is this information sensitive? Why are we
5 taking the position that we are taking? And why do we
6 feel so strongly about it?

7 CHAIR McRAE: Could you also include to
8 that why you are disadvantaged opposite the other bidders
9 who disclosed that information?

10 MS. HOUGHTON: We can, and, frankly,
11 Ms. Angooley can speak to that better than I can.

12 CHAIR McRAE: Commissioner Winslow may
13 want to add yet another.

14 COMMISSIONER WINSLOW: Actually, I don't
15 want to add at all. I'd like to subtract. Maybe I am
16 wrong, Madam Chair, but it sounds like we are gone into a
17 tit for tat, item by item sort of argument over
18 disclosure, and I am not sure that that's appropriate.
19 At some point in time, we are going to get to our
20 briefing from our bidders.

21 I thought we were considering a granular
22 approach to having Mr. O'Brien go through the issues and
23 determine the issues. If something happens to come up to
24 us, we will do it. But am I wrong or do you want to sit

0908

1 here and go through it?

2 CHAIR McRAE: Did you want to say
3 something on that, Mr. Geddes?

4 MR. GEDDES: Just point of
5 clarification, and I am not trying to jump in on the
6 information or eat into Mr. Houghton's time, but there is
7 a form, and this form is part of the bidding material.
8 Now, two of the bidders have filled this out -- well, one
9 bidder has filled it completely out and the other one 90
10 percent, and I think the way to get through this is to
11 ask Mr. Houghton if his client wouldn't mind, to say,
12 Fill out the form. If you feel that you cannot because
13 of these reasons that he just articulated, then that
14 notation should be put next to the item that is redacted,
15 and, since it looks like we are going to be doing a
16 granular approach, we will then review that redaction.

17 But the idea is to get everybody on the same page. At
18 the moment, we do not have a Form H that's been filled
19 out by NRG.

20 CHAIR McRAE: Which is specifically why
21 we are speaking about it at this juncture. And I want to
22 clarify at least my understanding that the granular
23 review does not speak just to Form H. I mean, it goes
24 well beyond. But there are a couple of matters
0909

1 identified in the -- identified in the Staff memo that we
2 are going to need to act on; for example, this Form H.

3 If, in fact, we decide, after hearing
4 from NRG, that we are going to disclose what information
5 we have on Form H, then NRG will have a few days to
6 address that, and I think that also applies to some
7 discussion on pricing.

8 Those two issues are independent of the
9 broader question of the granular review with respect to
10 all other redacted information. So, the reason we are
11 spending time with that now is because we need to act on
12 that, recognizing that the public comment sessions are
13 coming up next week on the 6th, 7th, and 8th, and we want
14 to give the public as much information as we possibly can
15 prior to that date.

16 That's not to say that that will be the
17 last opportunity for public comment, but to the extent
18 the more information we can get out there, the more
19 productive, I would view, those conversations would be.

20 And I think another important point that
21 is worthy of mention is that the FOIA request is to us,
22 the Public Service Commission, and to the extent we make
23 any decisions about disclosure, that's our
24 responsibility, not the bidder who says, Yes or no, I

0910

1 will disclose it. It is directed to the Commission. So,
2 the Commission needs to make some decision about what
3 it's going to do based on information it will be supplied
4 here by NRG.

5 MR. HOUGHTON: Madam Chair, just
6 briefly, then. You have put your finger precisely on why
7 I addressed the Form H, which is it was my understanding
8 that there would be some determination made today with
9 respect to the Form H issue, and, frankly, that

10 determination, if it's made in a particular way, we will
11 need time, as a company, and you alluded to this as well,
12 to determine what recourse we intend to take with respect
13 to the potential with respect to release of information.

14 Secondly, some of these issues do bleed
15 over from the micro to the macro, so I think it's useful
16 to allow just a brief period of time in which
17 Ms. Angooley will address why we are so concerned about
18 this, and just to correct, I think, an inadvertent
19 mistake by Mr. Geddes as to the state of the record right
20 now, we have, in fact, filled out a Form H.

21 There is a Form H that was submitted
22 yesterday, both in ten hard copies of the revised 1100
23 page submission, as well as a disk that was submitted to
24 the Commission and placed on the web site yesterday.

0911

1 So, there is some slight addition of
2 information to the Form H, but having said as much, if we
3 may, I'd like to ask Ms. Angooley to address the
4 specifics.

5 CHAIR McRAE: Will you state your name,
6 ma'am.

7 MS. ANGOOLEY: Caroline Angooley with
8 NRG Energy. Thank you, Madam Chair. I'd like to start
9 by saying there seems to be an impression that we have
10 withheld all Commissioner's information from our
11 proposal. As Mr. Houghton has stated, it's an 1100 page
12 proposal reflecting over two years of NRG's effort on the
13 cutting edge of IGCC technology.

14 What's actually reflected in our 1100
15 pages is an awful lot of emissions data around what we
16 know about IGCC plants in general and what their
17 emissions profiles are in general.

18 So, just to be very clear, what we are
19 talking about here in Form H is what are the very, very
20 specific emissions rates for each of the nominated
21 emissions in Form H and those we have largely redacted.
22 And the reason for that is this: With IGCC technology,
23 as with any power plant construction, one of the big cost
24 drivers and one of, frankly, one of these that's going to

0912

1 take most time for us to do, is negotiate our contract,
2 the construction of that facility.

3 One of the key things you do when you
4 negotiate your contract for the construction of the
5 facility is that you need to negotiate what the output
6 and performance standards are that you are paying your
7 \$1.5 million that you are investing in Delaware, what are
8 you getting for that?

9 We are, obviously, yet to have
10 negotiations with our construction contractor, now
11 technology provider, about specifically what levels of
12 emissions they must make sure that our plant, when we pay
13 our \$1.5 million for, will ridge.

14 If we disclose that information today,
15 this week, at some point before we have those
16 negotiations, clearly, we are at a material competitive
17 disadvantage because now our counter body knows exactly
18 what we are up for for Delaware, and you would expect
19 them, as good business people, to extract their pound of
20 flesh from our result.

21 So where it comes to specific emissions
22 rates to the IGCC plant that we have proposed in
23 Delaware, we have, indeed, withheld those throughout the
24 proposal, and we maintain it, for the reasons that I have
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1 just annunciated, that it would be very injurious to our
2 business not just in Delaware, but for our IGCC
3 development plants across the country, for that
4 information to be made public.

5 Somebody had asked a question about
6 comparatively then, why is it that NRG has this issue
7 with Form H and the other bidders do not? Bluewater
8 Wind, obviously, does not have emissions profile that's
9 comparable. Conectiv does, fired on natural gas, and the
10 comment and distinction I would make there is that
11 natural gas technology has been around and in use four
12 decades. There aren't very many secrets left in that
13 industry, when you are negotiating with a legal
14 contractor, as to what your required emissions profile is
15 going to look like.

16 So I can only guess that Conectiv's
17 thought process was, I am not giving away the store
18 because these have been done hundreds and hundreds of
19 times, which is a different concern from NRG, which is
20 taking an innovative base load technology, as required by

21 the Act, but it's still having to, you know, whip its
22 contractor into shape with a commercial contract without
23 losing all our leverage in a competitive bidding
24 disclosure.

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1 CHAIR McRAE: It's relatively new
2 technology, but it's out there in operation in a number
3 of places. I am assuming there are submissions data
4 associated with those existing facilities.

5 MS. ANGOOLEY: There absolutely is, and
6 in this country, there are two operational IGCC plants.
7 Both of them are smaller than the one we have proposed,
8 and neither of them use the more cutting edge technology
9 that we propose to use. They are using technologies that
10 came out in the 1980s and the early 1990s.

11 So you are absolutely correct, these
12 plants were in operation, and there are certainly, even
13 with the newer technology applications, there is enough
14 information to get a general sense what the emissions
15 range is going to be and that's exactly what we have
16 provided all throughout our proposal.

17 The only thing we are holding onto is
18 specifically what we are going to get from the public
19 disclosure; obviously, the agency will have it, because
20 we are yet to cut our deal with our contractor.

21 CHAIR McRAE: This is an opportunity for
22 the Commissioners and the agencies.

23 COMMISSIONER WINSLOW: Madam Chair. Do
24 you oppose what Staff has suggested with respect to the

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1 review of the information for possible public
2 dissemination?

3 MS. ANGOOLEY: I have an issue with the
4 recommendation in the memo that says Form H from NRG
5 should be made available to the public unredacted, yes.

6 MR. CHERRY: I have not seen this
7 submission of, I guess, the revised Form H that came out
8 yesterday, maybe I was missing it amongst the hundreds of
9 correspondences I have been getting on this issue lately,
10 but, you know, I am most concerned with public's ability
11 to look at your bid and compare it against what the
12 Indian River power plant is putting out today, all bid
13 issues considered, comparing it against what EPA or other

14 published data sources might say about the Commission's
15 profile from IGCC facilities that ultimately ask for --
16 answers the question as to, Okay, if I support this bid,
17 how is it going to be -- how is it going to compare to
18 what I have now at Indian River in the way of Mercury
19 emissions or NOX or SOX or CO2?

20 If -- again, I haven't seen this revised
21 schedule, so maybe I ought to look at it.

22 MS. ANGOOLEY: You know what, I don't
23 think that's going to be the answer for you. I think the
24 answer is actually already in our existing proposal and
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1 in information that is available and has not been
2 redacted that says -- go on.

3 MR. CHERRY: I can appreciate that.
4 Maybe my level of need is different, clearly it is, from
5 others in the public and who are watching this process,
6 and that's -- that's the gray area that we are dealing
7 with. There are some folks that are engineers, retired
8 engineers, practicing engineers who would disclose this,
9 I am not one of that.

10 I am interested in the public being able
11 to weigh this project against what's there today and
12 weigh it with some level of detail and some confidence of
13 what they are looking on to bid is what's going to
14 actually come out of the stack at the end of the day.

15 MS. ANGOOLEY: I think you are
16 absolutely right and we subscribe to that. I mean,
17 again, I don't want any of the indication of some of the
18 Q and A here to give the impression that NRG is somehow,
19 you know, putting this big IGCC plant that people don't
20 really fully understand and we are not willing to tell
21 people about it, that's not true. On the emission's
22 side --

23 MR. CHERRY: You don't need to go any
24 further.

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1 MS. ANGOOLEY: On the emission's side,
2 we clearly set out the historical data for the Indian
3 River plant. That's available to the public. We clearly
4 set out what we expect an IGCC and the range, and we
5 expect that we are going to be within that range. So,
6 when we conclude in our proposal ranges, it's not that,

7 Here is what the ideal IGCC plant emissions profile is
8 and we might end up anywhere. The implication from us
9 providing that information is that clearly we are going
10 to be within that range. The specifics as to where in
11 that range we are, which underlie the assumptions of what
12 goes into Form H, is still something we need to beat up
13 our contractor on and have those commercial negotiations.

14 But from the public perspective, they
15 can see exactly what Indian River existing and Indian
16 River proposal retiring units one and two and what the
17 IGCC is. And, certainly, I think we have been very
18 public about IGCC gives you reductions of over 99 percent
19 sulfur, over 95 percent Mercury, over 90 percent NOX. We
20 have said, on a combined basis, that we will reduce, you
21 know, over 80 percent SO2, over 80 percent mercury, and
22 over 60 percent NOX. That's clear. And we have said
23 that in a lot of different places. And if people want to
24 discuss that with us, we are absolutely available for

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1 that.

2 CHAIR McRAE: Commissioner Clark.

3 MR. CLARK: Just quickly. It sounds
4 like, and I have been listening to you, you talked about
5 having to still negotiate with the contractors to put --
6 I mean to figure out where you are going to be within
7 that range, so is the heart of the problem that there is
8 not data available at this point in time to fill out Form
9 H?

10 MS. ANGOOLEY: No. We have got data.
11 It really just boils down to, as I am sure none of the
12 other bidders, before you get to the power purchase
13 agreement, nobody is going to go out and go through the
14 year-long, six-month long process to negotiate the
15 construction contract. We are not alone in not having
16 done that. We know who we are going to use, but we still
17 have to sit at the table and look them in the eye and
18 come up with a deal, and reaching the targets that we
19 have put in our Form H that's redacted is obviously going
20 to be a key piece of that.

21 MR. CLARK: I was interested in knowing
22 what is commercially reasonable with regard to this data
23 being provided. Really, we have got the lay of the land
24 of three different companies and two of them have

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1 provided the data and one hasn't. That might not be an
2 accurate picture. I know there is some different
3 technological issues as far as IGCC is concerned, but I
4 don't know --

5 CHAIR McRAE: I also -- I understand the
6 latest -- I haven't seen the latest iteration of Form H,
7 so, the range question, I am not sure how helpful that is
8 in the overall scheme, and I would like comment if
9 someone of Staff is in a position to do that.
10 Mr. Geddes.

11 MR. GEDDES: Madam Chair, I think to
12 follow-up and to clarify, I believe that the latest form
13 of the Form H that NRG filed had an un-redacted topic
14 that had value, but in the public copy, they were all
15 removed and the general comment was confidential trade
16 secret. We have learned a lot more today about why NRG
17 feels this information should be protected. I renew my
18 earlier request for your consideration is that this form
19 be filed again with -- if it is going to be redacted or a
20 range cannot be given, that a specific reason be given,
21 not trade secret, but a specific reason, similar to what
22 we have heard today, and the person or persons who are
23 tasked with looking at this will either reach out to NRG
24 or will come to some resolution which presumably they

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1 will have an opportunity to dispute.

2 But it seems to me that we are still not
3 on the same page yet because all we have so far, and I am
4 being told this, that, as of yesterday, we have the
5 information, and then we have a form, everything is
6 redacted, confidential trade secret, and that's just not
7 enough to be able to determine whether that redaction is
8 appropriate or not.

9 MR. MULLER: May I be recognized?

10 CHAIR McRAE: No. I am staying with NRG
11 for this time. I mean, this certainly has been
12 continuing discussion, and I would reiterate, for the
13 Commissioners, that, at the end of the day, we have
14 responsibility, and NRG is not the one that has to answer
15 the FOIA request, so we have to be satisfied that it is a
16 legitimate withholding under an exception to the FOIA.
17 And to the extent that NRG is not inclined to provide

18 that information, I mean, how does the Commission speak
19 to the request?

20 MR. GEDDES: Madam Chair?

21 CHAIR McRAE: I am identifying, as a
22 spokesperson, Mr. Houghton, and I would ask that you
23 respect this process. I mean, it is part of my function
24 as Chair to acknowledge who will be speaking.

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1 Thank you kindly.

2 MR. MULLER: With respect to, Madam
3 Chair --

4 MR. HOUGHTON: Madam Chair, with respect
5 to Mr. Geddes' most recent comments, this is a, and has
6 been, frankly, a Herculean task. I am not looking for
7 sympathy, I am a professional, but it is a huge number of
8 documents, and, frankly, a huge number of redactions.
9 Unlike Bluewater, and, interestingly, unlike Conectiv who
10 submitted a much shorter form of response to the RFP,
11 and, therefore, could easily cross-reference the
12 subcategories to several of those redactions that were
13 involved, we have more than several of those redactions.
14 We have less than we did the last Friday, but we still
15 have a significant number, and we did cross-reference the
16 broad categories with subcategories underneath.

17 Frankly, it would be useful if, in the
18 course of Staff's review, there could be a dialogue, if
19 necessary, between NRG and the Staff reviewers about, if
20 we need to, item by item, the redactions, the basis for
21 asserting it, because it doesn't fall so simply in every
22 circumstance, the basis for redaction on page 33 is item
23 one or item two. It could, frankly, be both.

24 There could be bases under the law for

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1 something to both be a price related piece of information
2 and a trade secret piece of information.

3 So, with the indulgence of the
4 Commission, I simply want to reiterate that we have tried
5 hard, we will continue to try to work with the Commission
6 and Staff on this. We have not been lax. I can tell you
7 personally we have spent a tremendous amount of time, in
8 a way that I don't think NRG has had to spend in any
9 other jurisdiction, but that's, you know, Delaware is
10 unique and there is nothing wrong with that, but it has

11 been a unique experience for the company and it's been,
12 frankly, a unique experience for me in over 20 years of
13 practice, and, you know, we are trying to and we will
14 cooperate with as much of a granular review as Staff
15 would like us to participate in going forward.

16 CHAIR McRAE: Let me just state that
17 that has not, up to this point today, been my impression
18 of how the process has been moving. And that's why I
19 thought it very important for me to lay on the table the
20 fact that the Commission has the burden of justifying its
21 action, and to the extent that NRG does not cooperate in
22 providing us this information, we necessarily will err on
23 the side of caution.

24 Commissioner Winslow.

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1 COMMISSIONER WINSLOW: Thank you, Madam
2 Chair. May I ask my question one more time: Do you have
3 any objection to what Mr. Geddes is suggesting as a way
4 to, a process to resolve these issues? If so -- I mean,
5 obviously, you may have objection to their decision, but
6 do you have an objection to the process he is suggesting?

7 MR. HOUGHTON: Well, can I get
8 clarification as to what that process is? Here is what
9 we have submitted: We have submitted to the Commission
10 --

11 MR. WINSLOW: Why don't we get the
12 clarification of the process before you speak further.

13 MR. GEDDES: Just a moment, if I might.

14 MR. MULLER: If I may be recognized?

15 MR. GEDDES: Can I answer the
16 Commissioner's question?

17 CHAIR McRAE: Yes.

18 MR. GEDDES: The process that I
19 suggested, based on my understanding of the Form H that's
20 currently been submitted as of yesterday, is that the
21 material, the specific information is available and was
22 made available on a confidential basis, but the public
23 version of Form H showed no values for these various
24 categories and the explanation for that was confidential

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1 trade secret.

2 And what I am asking is that the company
3 go back and review that work, and, this time, to the

4 extent that they still believe that it should be
5 redacted, that they put a specific reason as to why it is
6 commercially sensitive and its disclosure will somehow
7 prejudice their business model. Similar to the
8 explanations that the representative from NRG expressed
9 earlier, there, obviously, are concerns that Staff,
10 looking at a general explanation trade secret, could not
11 discern from that material. I think we have learned more
12 today as to why NRG is not similarly situated to the
13 other bidders, and, perhaps, does have a reason to keep
14 this information confidential.

15 I cannot tell you, based on what I have
16 heard, whether a third person reviewing this would find
17 that acceptable or persuasive. But without the -- even
18 that amount of information, there is no way to evaluate
19 whether it is, quote, a trade secret or not. So what I
20 am asking is that the company go back, give us specific
21 reasons so that somebody trying to make sense of whether
22 it should or should not be disclosed has some basis on
23 which to make the decision.

24 CHAIR McRAE: Let me also be clear: As
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1 I read this, though, to move the process along, the
2 Commission is being asked to authorize the release and
3 allow time for NRG to respond so that we don't end up, on
4 the 20th, revisiting this same issue, this specific item,
5 so there is a time pressure.

6 MR. HOUGHTON: Madam Chair, here is the
7 company's response: To the extent that the question is
8 being asked with respect to Form H and Form H only, I
9 think we have just created a record with respect to that
10 information.

11 If the Commission Staff would like us to
12 supplement or to somehow boil down to a very simple
13 paragraph what we have said with respect to Form H, we
14 are pleased to do that. We can do that by the end of the
15 day today, and that be can a further illustration and
16 basis for the redaction in our judgment of Form H.

17 I would just please note that with
18 respect to the dozens and dozens of additional
19 redactions, to state a further detailed basis, frankly,
20 that process will benefit significantly from a dialogue
21 with Commission Staff, as Commission Staff reviews these

22 items, so that we can talk about why we have done it. We
23 have referenced broad categories, and there are
24 subcategories underneath them.

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1 I am not sure, frankly, that simply
2 saying, with respect to any one item, rather than it just
3 being price related commercial information, it is an
4 additional -- in addition, it's corporate financial
5 information relating to the internal cost of capital the
6 way Conectiv did, I have a feeling there is going to be
7 additional questions.

8 So I am just suggesting that this -- we
9 are prepared to cooperate with Staff, we will meet with
10 Staff, we will spend hours and days with Staff to try to
11 further illustrate what the basis is. But with respect
12 to Form H, we certainly will provide additional written
13 information by the end of the day today as to the basis
14 for the confidential treatment of the formula.

15 MR. GEDDES: Point of clarification.
16 The memo only suggests Form H be produced. I believe
17 that we have Mr. Houghton's explanation clearly. The
18 agency could say, Produce -- I have heard what you have
19 said, I am not convinced, produce the information, you
20 have three days to take whatever, you know, relief you
21 want to.

22 The other option is to go through this
23 on an iterative basis where we, whoever the reviewer is,
24 looks at this information, makes -- and that would

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1 include all the information, not just the information on
2 Form H -- makes their decisions based on the information.
3 To the extent they need more information, talk to the
4 bidder about it, but then give the bidder an opportunity
5 to input into that and then release it. And, again, give
6 them an opportunity to challenge it in some form.

7 But without some iteration in this
8 process, we are just going to be where somebody is going
9 to say it's confidential and the other person is going to
10 say it's not. And there is no way to get through this
11 thicket unless there is, one, an opportunity to review it
12 with all the explanation, and, two, give the party with
13 whom has redacted the information and may disagree with
14 your decision, the opportunity to comment.

15 CHAIR McRAE: Commissioner Clark.
16 COMMISSIONER CLARK: A question for
17 Staff. I mean, in the memo, you indicated that the
18 agency's independent consultant did review pricing
19 information. Has there been any review as to, I am
20 calling it commercial resources, that's not the right
21 standard, but what the independent consultant feels the
22 confidential nature of the submissions data is, and if
23 not, can they explain it?

24 MR. GEDDES: I believe that it will use
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1 all resources at our disposal to go through this, but I
2 believe on the emission's information, that people
3 believe that that is not confidential information and can
4 be disclosed.

5 COMMISSIONER CLARK: Would the Staff
6 feel comfortable speaking to that now? One of the issues
7 that I am struggling with is, and we do have public
8 hearings next week and I know everybody, I mean, bidders,
9 I mean, the Staff, everybody has been hustling trying to
10 keep up with this process that's going along, but, I
11 mean, it would be nice, if there is information available
12 to make the decision today, I'd like to make it.

13 MR. GEDDES: Mr. Myers has a point.

14 CHAIR McRAE: Mr. Myers, please.

15 MR. MYERS: I will throw something out
16 responding to Mr. Clark's statement, previous statement.
17 One thing the Commission might want to consider is a
18 shadow track here treating the FOIA request and decisions
19 about the documents as one thing and maybe, in
20 particular, the Form Exhibit H criteria to give
21 information out -- or some relevant information out that
22 may be not the necessary document.

23 What I heard NRG just say was the reason
24 they didn't want to disclose these things is I assume
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1 they want to hold their -- these numbers, their target
2 numbers in confidence so they can negotiate price to
3 those targets with their vendors without their vendor
4 knowing what the target ratio is so they can get the
5 biggest bang for their buck and only they know what the
6 target ratios are going to be.

7 I suggest, if that's the situation,

8 unless there is no range of what those targets would be,
9 there is a possibility that there is a range, that all
10 vendors know the, the contractor is going to know about
11 what the emissions are, that maybe NRG would consider
12 releasing the range as additional information be
13 available at the time of the public comments to go
14 forward with the decision on whether the Form H gets --
15 and the true number gets released, but at least have
16 available for the public comment session a range of
17 information. I would think that there was a publicly
18 known range of what these IGCC plans do, that, in fact,
19 it's not going to compromise their ability and
20 negotiations with their vendors.

21 I didn't make myself clear.

22 CHAIR McRAE: I did hear the
23 representative speak to the fact that the range was not
24 an issue, that it either will or did disclose the range.

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1 I am not sure which.

2 MS. ANGOOLEY: Yes, Madam Chair. We
3 disclosed ranges for IGCC technology in general. We did
4 not disclose ranges in, you know, Form H one point
5 source, but we did not disclose ranges for our specific
6 proposal.

7 CHAIR McRAE: It might -- my own sense
8 of this, and that significant information, I don't know
9 that the Commission is prepared to decide this question
10 today. I think Staff has provided us a vehicle to get to
11 the heart of what we need to ultimately do, and by
12 deciding that the information will be disclosed and
13 putting a timeline on it, it does drive the process to
14 some clarification of what information it will have.

15 My present leaning is to adopt the
16 approach that Staff has said with respect to Form H and
17 call for the disclosure, and, perhaps, ultimately it will
18 end up working out the range, but, you know, I'd like to
19 know what we actually have our hands on, and I also
20 support the view with regard to the pricing information,
21 which is the -- the detailed information, the redacted
22 pricing information would not be released at this time.
23 And I also would endorse the granular approach to getting
24 this information that we need.

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1 And I would state, for the record, that
2 it is unacceptable to me, at least, to have confidential
3 trade secret if I, as a commissioner, am in the position
4 of having to defend the decision. And that's generally
5 my sense of this, and I welcome all the other parties to
6 comment, but I think we can go on and on, and what I want
7 to happen is I want to have the best information
8 available to the public next week for purposes of the
9 town meetings that we have scheduled.

10 I fully understand that we are not going
11 to be able to get all information out there at this
12 juncture because this granular process will take time,
13 but as I indicated in my preliminary introductory
14 remarks, there will be additional opportunities for
15 public input in this matter.

16 So, this is my sense at this present
17 time, and if the Commissioners also want to share
18 comment, I would like to get to closure on this
19 discussion because there certainly is more that we have
20 to have done here.

21 So -- and I welcome the input from our
22 colleagues in this endeavor, but we do need to proceed.

23 Mr. Inskip.

24 MR. INSKIP: If Mr. Houghton and his

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1 client and the Commission and the other agencies have
2 preliminarily explored the NRG issues, I would just like
3 to make a couple comments on behalf of Conectiv, two of
4 which, actually three, two of which are directly raised
5 about Conectiv's response by the February 23rd memo.

6 One says that the Commission ought to
7 order the disclosure or permit the disclosure of engineer
8 names. The company acquiesces in that comment, and we
9 will re-file its public version if that's the appropriate
10 way to do that.

11 The other -- the other specific item as
12 to Conectiv was the movies and standard and force
13 reports, and the Staff memo noted there is no reason to
14 withhold these unless for reasons of copyright
15 infringement, and, as I understand it, that's precisely
16 the problem.

17 It may not be a big issue. These things
18 cost hundreds of dollars, but that may not be that big an

19 issue. The thing is, though, that it's S&Ps and Moody's
20 rights, not Conectiv's. These things are not
21 confidential. As the Staff memo points out, you can buy
22 them. They may be in libraries, I don't know, but the
23 company just did not feel at liberty to, itself, publish
24 these --

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1 CHAIR McRAE: Based on copyright?

2 MR. INSKIP: Right.

3 CHAIR McRAE: I think that may be

4 something that could be worked on.

5 MR. INSKIP: Right. And maybe there

6 ought to be some way to be, some standard administrative
7 procedure that the General Assembly ought to think about
8 going through that third-party issue.

9 We are glad that the Staff is

10 recommending to the Commission not to disclose pricing
11 information now. We were a little concerned at the Staff
12 comment that the Freedom of Information Act is a way for
13 the public to force the government to release
14 information, not a reason for the government to refuse to
15 release information, so that even though it might not be
16 duty bound to release the confidential bidding
17 information, that might well be within the discretion of
18 the Commission and of the other agencies present today.

19 We submit that that is somewhat

20 confidential -- I would -- rather, very controversial,
21 potentially, and not just as to private company trade
22 secrets and financial information, that reasoning would
23 apply to all of the other items that are defined as not
24 being public records. I am including criminal conviction

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1 information, which, for one reason or another, is kept
2 private, other individual privacy interests, terror --
3 national security or prohibitions to make terrorists'
4 work more difficult, and capitally, though -- so I think
5 they are big issues there.

6 And I think when the General Assembly

7 defines proprietary financial information as not being a
8 public record, it has made a pretty big policy judgment
9 that the Commission ought not to likely ignore.

10 And, indeed, in the Commission's own

11 Rule 10, which is devoted to implementing the Freedom of

12 Information Act, there is reasserted the need to protect
13 proprietary information.

14 Fortunately, I hope the Commission will
15 agree that that's an academic point today because we are
16 not to a granular a review yet, we are not going to have
17 a general review of pricing information. I hope if there
18 were to be a review -- or a general release, that it
19 would be conducted, as the Staff suggests, with advanced
20 warning to the bidders so that they -- in time for them
21 to take legal action if they wanted to.

22 And one final comment, and it may
23 ultimately save some time in this, what I think sounds
24 like a back breaking job of granular review, as to the
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1 pricing, I am not talking about other trade secrets, but
2 as to pricing, the Staff memorandum makes the point,
3 which is a great bottom line point, that the Commission's
4 consultants have seen all of this information, and they
5 are able to say what the economics are going to be. And
6 I think the Commission, and maybe all the other agencies
7 except for DNREC, might find that -- that the real oath
8 star. And if the public knows, as it does, by reason of
9 the release of the evaluations, where these parties'
10 stack up economically, they don't really need to know
11 how, you know, the many calculations by which they got
12 there.

13 Thank you.

14 CHAIR McRAE: Hold on.

15 MR. CHERRY: I don't know about the rest
16 of you but I am getting hungry. I think we do need to
17 resolve this issue as quickly as we possibly can. The
18 hole in all this is that, next week, we are going into a
19 public setting, and the public has a fair bit of
20 information from the consultant's report, both the
21 independent consult and from Conectiv -- excuse me,
22 Delmarva's consultant, about price and a lot of
23 information about price that would help us sort of digest
24 the bids but there is nothing in those reports about
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1 emissions, and we got to fix that.

2 And, you know, it seems to me that maybe
3 Mr. Myers or Mr. Geddes or maybe even Mr. Houghton have
4 hit on a potential path forward, and that might be a

5 re-review of Form H here today that could give us, in the
6 terms or in the context of this particular proposal, not
7 what the national numbers are on IGCC but what range of
8 numbers we might see from Indian River's proposal, and to
9 do that, that is a range, as Mr. Myers suggested, but for
10 this particular project, to get that out, then, as early
11 as today so that the public can be informed by something
12 that's specific to this project, not so much out of the
13 literature on IGCC generally.

14 MR. HOUGHTON: Madam Chair, members of
15 the Commission, agency representatives, we can and will
16 prepare a Form H that includes a range, and we can offer
17 that up, we need to consult with our engineers, but we
18 can offer that up probably not by the end of the day, but
19 I'd ask for by the end of tomorrow, and that, at least,
20 is a step in the right direction to meet the concerns
21 that Mr. Cherry has noted, so we are prepared to provide
22 that promptly.

23 I did have one other issue that I wanted
24 to discuss, and we are prepared to work expeditiously, as
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1 we have been doing on this granular review with Staff,
2 and we will consult with them before we leave today.

3 There was one other issue mentioned at
4 the memorandum that I wanted to mention relating to a
5 press release from Chesapeake Utilities because I wanted
6 to address why we would have redacted and deemed
7 confidential a press release.

8 Well, it's sort of we have been outed
9 now. The press release, in and of itself, is just that,
10 it's a press release. But it was included in the
11 material to make a point about someone we were having
12 ongoing and are having ongoing vendor-related propriety
13 discussions with. We attached the press release, which
14 would appear innocuous. We redacted it.

15 There has been a recommendation by Staff
16 to release that information which, in identifying whose
17 press release it was, has already, frankly, revealed
18 something that was proprietary and confidential on our
19 behalf. It puts us, frankly, at a disadvantage now that
20 this information is released.

21 All I am suggesting is it's a touchy
22 issue, these are thorny questions, but we are prepared to

23 work and want to work with Staff through all of this as
24 expeditiously as we could.

0938

1 CHAIR McRAE: I think one way to avoid
2 that kind of problem is to be clear in terms of what your
3 reason is. And I just can't overstate the importance of
4 having a basis for the decisions you make. And to the
5 extent that the parties want to review again what they
6 have submitted, we are on a very short time limit with
7 this juncture, but the granular review is driven by the
8 fact that the information that the Commission needs to
9 defend whatever position it may choose to take, is not
10 available.

11 So, I think we can probably save
12 ourselves a lot of work to the extent that we have a
13 genuine effort to disclose all that is not confidential
14 trade secret.

15 Mr. Myers.

16 MR. MYERS: I am a detail person, so I
17 want to clarify one thing. My suggestion was that they
18 not replace Form H, the original, with a range. I think
19 the Commission is entitled to see the actual numbers.
20 But my idea was you have a shadow Form H that would be
21 available for public information by the time of the
22 public hearing. I don't want them to reveal out actual
23 information.

24 CHAIR McRAE: If you recall my proposal
0939

1 to the body that's present was that we accept the
2 recommendation that Staff made, which, in fact, would
3 call for that sort of some response from NRG that
4 negated that approach.

5 So, I am actually prepared to adopt the
6 recommendations that staff has made in this instance and
7 proceed unless there is -- yes.

8 COMMISSIONER CLARK: Just one question:
9 As far as the independent consultant is concerned, I
10 mean, is there an opinion available that can be given as
11 to whether or not this information should be deemed
12 confidential for prior hearing as applied to IGCC
13 technology, or is that something that, in light of what
14 NRG has stated today, is that something that we should,
15 based on the Staff's recommendation, take a little bit

16 more time?

17 CHAIR McRAE: Could I suggest this,
18 because we are really going to be hung up some time on
19 this issue, is if, in fact, we follow the recommendations
20 and say that it will be released, it sets a clock on
21 getting the information we need, which could include a
22 consultant's report, that could include NRG's input as to
23 why it should not.

24 If we leave here without having done
0940

1 that, then the Commission is not going to formally meet
2 again until the 20th. So I do think we need to keep the
3 clock going on this activity, but it may take time on
4 both sides to get the kind of answers we need.

5 COMMISSIONER CLARK: But my
6 understanding of the recommendation was that Form H is
7 going to be -- my understanding of the recommendation,
8 Staff's recommendation was that all the Form H
9 submissions are going to be released as if we adopted
10 their recommendation. Am I correct in that?

11 MR. GEDDES: You are correct.

12 COMMISSIONER CLARK: So if we adopt
13 that, it's going to be released. Yes, they have an
14 inherent time, but that will be run by the time we come
15 back.

16 CHAIR McRAE: That's why I am saying
17 that that would necessitate a very quick process for the
18 challenge and the supply of information if we leave and
19 we do nothing and we say, We'd like to hear from
20 consultants, we will be back in the same position on the
21 20th. A decision can be made in the next three days,
22 based on whatever information everybody pulls together,
23 what should be done with that information.

24 And that's -- that's really what I am

0941

1 trying to get.

2 MR. GEDDES: Point of clarification so
3 our position is fluid, Staff's position, as I understand
4 it, is that we will, in connection with requesting that
5 the Form H be produced, except as meeting that
6 requirement, a range, as Mr. Houghton has suggested, if
7 it is agreeable to the other agencies, and, specifically,
8 DNREC, since I assume you have the greatest interest in

9 this outside of the PSC?

10 MR. CHERRY: Is that all inconsistent
11 with what I just asked for?

12 MR. GEDDES: I just want to make sure we
13 are all on the same page.

14 CHAIR McRAE: I think he asked for a
15 range that was relevant to this process versus what's in
16 the literature, so I think we ought to be clear what
17 "range" meant in the context of what Mr. Cherry said.

18 MR. GEDDES: I just want to make sure
19 that if Staff's position moves, that Mr. Cherry is happy
20 with it or his point is, you know, refined?

21 MR. CHERRY: Again, my interest is in
22 what we have available to the public on Tuesday, and I
23 think, given the difficulties here and the explanation
24 that I heard from NRG as to why they would keep these

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1 items redacted, that's the best they could do by next
2 week, would have a revised Form H with some ranges that
3 were particular to this project. So, yes, I agree with
4 you.

5 MR. GEDDES: Now we agree with you.

6 MR. CHERRY: Thank you.

7 CHAIR McRAE: Having all that said, does
8 that -- is that okay with you, Commissioner Clark?

9 COMMISSIONER CLARK: Just a point of
10 clarity. We are talking about not going forward with the
11 original recommendation. The only additional
12 Commission's information, then, if that approach is
13 adopted, would be to disclose a range, and then we are
14 going to have to revisit the issue after a granular
15 review regarding this on the 20th.

16 MR. GEDDES: That's Staff's position,
17 that we would do that analysis in addition to --

18 MR. CHERRY: My concern is that we vote
19 to release Form H in its existence today, that we might
20 be in a position, say as of Friday this week, with some
21 action by NRG, to overturn that or to prevent us from
22 receiving it in time for a public dialogue last week. We
23 needs to get something out to the public that's real,
24 that's quantifiable, that they can chew on in addition to

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1 what the independent consultants did in their report on

2 the price side of the question.

3 CHAIR McRAE: Okay. With just a very
4 sound modification, there also is the other comments --
5 if we are all in agreement with the -- with the exception
6 of change that we talked about the range, are we prepared
7 to move ahead with the proposals?

8 MR. NATHAN: May I speak? Aaron Nathan
9 for The News Journal. I think our request was to -- for
10 the Commission to address something as a public record or
11 not a public record, so giving them a range, having them
12 change the public record, how would that address The News
13 Journal's request?

14 CHAIR McRAE: Well, as was suggested,
15 that granular review would still continue. It would be
16 for purposes of public disclosure for the meetings next
17 week, that there be some information that at least gives
18 the public some sense of what we are talking about with
19 emissions.

20 The review process, with respect to what
21 information should be publicly available, would continue
22 at a granular level and it would look at Form H under
23 that review. So, this is, if you will, a stop gap
24 measure for further proceedings around disclosure.

0944

1 MR. NATHAN: Just improvising here, I
2 would simply warn folks not to let that get too far down
3 the tracks before it becomes too late for the public to
4 make a meaningful, what's the word?

5 THE CHAIR: Input.

6 MR. NATHAN: Input, right.

7 CHAIR McRAE: We are very much aware of
8 that, and as I said in my earlier comments, there are
9 other opportunities for public input, and as you might
10 imagine, the documents that we are dealing with are
11 voluminous. It's not, by any means, an intent of the
12 Commission to unnecessarily withhold information, but, in
13 fact, it will certainly take -- I mean, this is a very
14 small -- this is just my records for today. So, a
15 granular process is not an overnight event. And, of
16 course, confidential trade secret data is extremely
17 important so I think the Commission is going to have to
18 act out of an abundance of caution because of the harm on
19 either side because the bidders also have exposure to

20 harm.

21 So --

22 MR. FIRESTONE: Madam Chair.

23 CHAIR McRAE: Mr. Firestone, this is
24 going to be the last -- I haven't heard from Bluewater on
0945

1 this. That's the last of the comments. We really need
2 to bring closure to this.

3 MR. McGONIGLE: Tom McGonigle
4 representing Bluewater Wind. We have sat quietly through
5 this. Let me say we support a very open public process
6 here that's fair. I would just caution the Commission
7 that this issue of a range, what that range is, how
8 precise it is, is going to directly affect how much true
9 public input there is in the process. I am not sure what
10 range we are talking about here, but it strikes me that
11 it needs to be a fairly focused range; otherwise, we are
12 not going to have a real meaningful public debate about
13 this very important issue of emissions.

14 CHAIR McRAE: I appreciate your comment,
15 and I would say that good faith is going to play a very
16 important role here and it may set the tone for the kind
17 of aggressive behavior that may come from the Commission
18 and its fellow agencies. So I appreciate that you put
19 that forth, and I would ask all of the parties to
20 cogitate on how liberal or non-liberal they want to be in
21 disclosure because it will ultimately impact how we
22 proceed in the decisions that we make. So, thank you.

23 Mr. Firestone, you have the last comment
24 on this if we are going to close this segment of that
0946

1 discussion.

2 MR. FIRESTONE: Thank you, Madam Chair.
3 Just one other somewhat related item to the emissions
4 data is the data that goes to the efficacy and
5 possibility that NRG may be able to actually capture and
6 sequester carbon. That goes to whether what the extent
7 of emissions are likely to be, as far as carbon, and all
8 of that information regarding the efficacy of
9 sequestration that's been redacted is for the public, so
10 the public really has no knowledge as to the possibility,
11 from a scientific standpoint, as to whether that can be
12 done.

13 CHAIR McRAE: Anyone else want to
14 comment?

15 MR. MULLER: May I be recognized, Madam
16 Chair.

17 CHAIR McRAE: Mr. Muller, please. NRG,
18 do you have any comment that you would like to make?

19 MR. HOUGHTON: Madam Chair, members of
20 the Commission, in the course of this review, we will
21 work through all of these issues with Staff. We have a
22 view of the efficacy of our technology, and I don't
23 necessarily want to take the time of the Commission
24 defending it today here.

0947

1 I will note this, though: This notion
2 of getting guidance from consultants for determining the
3 confidentiality of pricing information, I think, in a
4 broad sense, that may be helpful, but suffice it to say
5 that we have significant concerns and disputes and
6 differences of opinion about the use of that pricing
7 information for determining the preliminary rankings that
8 have been made.

9 So I would just caution the Commission
10 that while it may sound like a good approach in concept,
11 the devil is in the details and it will be laying all
12 those details out very quickly for the public.

13 CHAIR McRAE: Thank you for that.
14 Mr. Muller, it must be very quick, and I have said to
15 you, This is not a public comment session.

16 MR. MULLER: Madam Chair, you are
17 developing a record on the question of the appropriate
18 degree of confidentiality of this information, at least
19 so as Commissioner Clark suggested you were seeking to
20 do. If you hear from only one side and refuse to hear
21 from the other, it's very hard to see how a sound record
22 can be developed.

23 And I want to point out to you one fact
24 and then I will settle down: Delaware has an IGCC plan,

0948

1 one of the few in the world. It's at the Dover City
2 Refinery, but it's very similar in technology to what is
3 proposed by NRG. We were involved in the permitting of
4 that about 15 years ago. We had some things to say about
5 it that turned out to be correct, but nobody, at that

6 time, claimed that the emission's information needed to
7 be top secret, that, somehow, the sky would fall upon the
8 finances of the people doing the project if we knew what
9 the emissions were going to be.

10 So, the arguments we are hearing are
11 totally lacking in any kind of credibility, and nobody
12 should know that better than Mr. Cherry because his
13 department is involved in permitting facilities.

14 So, I suggest that, and I won't go on,
15 that there is a great deal more out there that you need
16 to hear if you are attempting, in good faith, to make
17 this decision, and with all due respect, you ought to be
18 wanting to hear it, not trying not to hear it.

19 This is supposed to be, as I understand
20 it, the Public Service Commission, and like all other
21 state employees, you did an oath or an affirmation which
22 contains the phrase, "Always to put the public interest
23 above any special interests," and I don't believe you are
24 doing that. I don't believe the way to work out these
0949

1 issues of confidentiality is, as NRG wants, for deal
2 making to be done with the Staff because the Staff has
3 already taken a position contrary to what many of us
4 considered to be the obvious public interest in this
5 matter.

6 So, I think you need to, if you go down
7 this road, if you continue to do this, as you are doing,
8 you are building a record that not only contains numerous
9 instances of what, arguably, is a reversible error, but
10 you are setting up a scenario in which the public will
11 not, in fact, have the information it needs to comment
12 knowledgeably on this and to participate in a meaningful
13 way in the decision.

14 One other thing.

15 CHAIR McRAE: Mr. Muller, I am sorry, I
16 did say brief comments. The people have been here for a
17 long time. You have an opportunity to make your public
18 comments next week, including these very points. You
19 feel that you are not having appropriate air time, there
20 should be such quantity of that next week. But at this
21 juncture, I am going to ask you to summarize and save
22 whatever additional information you have to offer for the
23 public comment session next week.

24 MR. MULLER: Okay. So you don't want to
0950

1 hear anything more?

2 CHAIR McRAE: That's correct.

3 MR. MULLER: All right. I would like
4 the record to note my objections.

5 CHAIR McRAE: Very fine.

6 I believe so -- we need to still act, I
7 guess, to get this clarified, the last thing we need to
8 be heard was that a range would be submitted and that we
9 would follow, essentially, the Staff plan that's set
10 forth in the memo of February 26th, 2007, that we
11 received; is that agreeable to the Commission? If so,
12 can I have a motion and a second and we can proceed to
13 lunch.

14 COMMISSIONER CONAWAY: So moved.

15 COMMISSIONER WINSLOW: Second.

16 CHAIR McRAE: All in favor.

17 THE COMMISSION: Aye.

18 CHAIR McRAE: Opposed? Thank you.

19 I think we want to make clear, for the
20 record, that the Controller General's Office did not
21 participate.

22 I believe that's, you know, we do have
23 an additional component to this proceeding, but I am
24 going to ask that we take a lunch break at this time and
0951

1 continue. How about 2:30, an hour? Sounds good. Very
2 fine.

3 (Recess taken.)

4 CHAIR McRAE: Thank you. I feel quite
5 fortunate that this is the closest I will come to being
6 the speaker. At this point in the day, I can't tell you
7 what I might do with this gavel.

8 A couple of things before we get
9 started. I want to clarify in that last vote that we
10 took, which was with respect to the path forward on the
11 confidential information, and, essentially, what we said
12 was that we would follow Staff plan with the modification
13 around the range, and I have been advised that the Office
14 of Management and Budget and the Controller General's
15 Office also was on board with the approval of that plan.
16 And perhaps because I wasn't paying close attention, I

17 thought that they had just not spoken on that issue, so
18 maybe the record is clear, but if it's not, I want to
19 reflect that.

20 That said -- there was something else I
21 was told to share. For those of you who have not
22 received a copy of the independent consultant's report, I
23 understand that copies are available in the front here,
24 as well as the presentation that we are going to hear
0952

1 this afternoon. And I know we have had a very busy day
2 and people are probably a little bit tired, but we are
3 going to try to work through this process as quickly as
4 we can.

5 Let me explain again for some of you who
6 may not have been here earlier today when I presented
7 what was to occur. At this time, the four agencies who
8 are evaluating the bid process are going to hear the
9 consultant's report, the responses of Delmarva, and they
10 will have an opportunity to ask questions of the
11 consultant, Delmarva, and, if they choose, the bidders in
12 this matter.

13 It is not a public comment session. It
14 is not a forum for debate with respect to whatever the
15 bidder's view may be on the consultant's report. It is
16 for the parties that are evaluating the bids to have an
17 opportunity to dialogue with the consultant, Delmarva,
18 and, if they choose, the bidders.

19 That said -- we were just working out a
20 few dates here -- and the way we are going to go with
21 this is we will hear from the independent consultant,
22 there will be an opportunity for question and answer by
23 the evaluators, and then we will hear from the next
24 person, and Q and A, and it may lead any number of -- to
0953

1 any number of inquiries, but we will start out by hearing
2 from our independent consultant.

3 MR. SHEINGOLD: Good afternoon,
4 Commissioners. I am Barry Sheingold. I am with New
5 Energy Opportunities, Inc. I lead a consulting team that
6 we collectively comprise the independent consultant and
7 we are here to give a summary of our bid evaluation
8 report.

9 The bid evaluator's report is flowed

10 from the RFP for long-term contracts from new generation
11 in Delaware as directed by the Delaware Legislature,
12 pursuant to the statute.

13 We were retained by the four state
14 agencies to oversee the RFP and to assist in evaluating
15 the bids.

16 Back in October, the Commission and
17 Energy Office directed Delmarva to issue modified RFP
18 that was different from the one Delmarva initially
19 proposed.

20 We received three bids in late December:
21 Bluewater with a bid of 600 megawatt offshore wind.
22 Conectiv, their proposed bid of 177 megawatt combined
23 cycle natural gas --

24 CHAIR McRAE: That's worse. This seems
0954

1 to be an ongoing problem.

2 MR. SHEINGOLD: I will speak louder. I
3 will focus on -- NRG did propose several bids from a 600
4 megawatt coal gassification.

5 We issued our evaluation report last
6 week on the 21st, as did Delmarva Power. Looking -- we
7 issued a report, as did Delmarva. We had the same rank
8 order of bids as Conectiv, Bluewater, and NRG, although
9 our analyses differed in various respects and really our
10 conclusions.

11 Delmarva has taken the position that all
12 bids should be rejected, based on the analysis, all the
13 bids above market. We are not making any recommendation
14 on the bids at this time.

15 We will be conducting additional
16 analysis over the next five- week period. We have an
17 additional report that's due in early April that will
18 focus on the risks and benefits of going forward with one
19 of the bids versus not going forward with any of the
20 bids.

21 This would consider the bids in relation
22 to all the other alternatives and others matters that
23 were recommended and considered to the IRP process.

24 I'd like to give a short summary of
0955

1 bids. Bluewater proposed the choice, really, of two
2 projects, Atlantic North, Atlantic South. There was

3 another proposal from Delaware Bay, but that was
4 withdrawn. They are both 600 megawatt projects. They
5 are approximately seven to 13 miles off the coast. They
6 would consist of 200 three-megawatt wind turban
7 generators. They would be spread over 30 square miles of
8 surface area.

9 For each of those projects, they have
10 bids based on term and the contract size. The terms were
11 20 years and 25 years. They had a 600 megawatt of energy
12 and capacity, from 600 megawatts of wind turban to 400
13 megawatt per hour energy cap, and then they had a second
14 set of proposals, 400 megawatts, which is basically
15 two-thirds energy capacity from the 600 megawatts of wind
16 turbans.

17 They proposed fixed pricing for energy,
18 UCAP, or unforced capacity, and a portion of the
19 project's renewable energy credits. The pricing was
20 doubly priced in constant year dollars, which, another
21 way of looking at it, it escalates that Delmarva assumed
22 inflation rate of two-and-a-half percent per year.
23 That's the structure of the proposal.

24 Conectiv's gas combined cycle at
0956

1 Conectiv's existing Hay Road site in north Wilmington.
2 There were two commercial proposals: The base proposal
3 was a sale of energy and capacity from the plant that was
4 contingent on the sale, that Delmarva would be
5 dispatching energy from the project.

6 The alternative would be the capacity
7 backed, or asset backed capacity with firm energy such
8 that Delmarva would determine a day in advance whether it
9 wants to buy energy at a fixed prices and Conectiv would
10 have the ability to either deliver energy from the unit
11 or from some other source. And the, in order for -- in
12 exchange for that flexibility, Conectiv proposed lower
13 rates and that was evaluated as being superior to the
14 base proposal.

15 In terms of their pricing formula, they
16 have a one-time adjustment to one-third of capacity and
17 100 percent of on-peak energy based on five-year futures
18 gas price index.

19 After the first year, the on-peak energy
20 price would adjust based on changes in coal index and

21 inflation index. In addition, they were taking the risk
22 if there was further federal regulations, it would be
23 more intensive than costs that they proposed to be passed
24 through. That was -- here we are in terms of the bidder
0957

1 was supposed to take responsibility for compliances with
2 future CO2 compliance costs.

3 They also proposed a ten-year term with
4 a five-year option.

5 NRG: 600 megawatt compliance cycle
6 integrated gassification/combined cycle plant, coal
7 fired. It would be at the site of the Indian River
8 plant. What they proposed, if they got the contract and
9 they got to build this project, that they would shut down
10 Indian River units 1 and 2.

11 Of the 400 megawatts, 280 megawatts
12 would be sold on a must take basis and there would be 120
13 megawatts with Delmarva that would economically have the
14 ability to either take it or not take it.

15 There was also an option in which NRG
16 offered to provide carbon capture and sequestration for
17 carbon capture portion at fixed costs and the
18 sequestration portion would be on an estimated basis; in
19 other words, it would not provide a firm price. It would
20 be effectively in a capacitor basis or a cost plus basis.

21 Pricing: The capacity payments are
22 based on inflation index. Energy was adjusted based on
23 combination of energy index and inflation index.

24 There was a -- they also proposed a
0958

1 passthrough for CO2 compliance costs, but they would
2 allocate a portion of any allowances that Indian River
3 units wanted to get after shutting down that unit or
4 those units.

5 They proposed terms of 20 to 25 years.

6 Just kind of stepping back in terms of
7 the economic evaluation, given the fact that bidders,
8 bidders sought to apportion potential CO2 compliance
9 costs, that the economic evaluation fully considered,
10 both the market case and the cases for all the bids, CO2
11 compliance costs, that was incorporated in the analysis.

12 I want to talk about the general
13 evaluation, economic evaluation. It looks at the

14 wholesale market price of energy and capacity associated
15 with the standard offered service as they would be
16 affected by bid, capacity, and energy costs.

17 When asked how that compares with
18 current standard offered service retail rates, which are
19 at 11 cents a kilowatt, it really -- they are really not
20 comparable to the market rate projection which I think is
21 shown on, it's one of these slides here, slide 12, yet,
22 it really -- that comprises of energy and capacity costs,
23 that's at 2005 hours. If you take that as the current
24 dollars in 2012, which was the first full year of any of
0959

1 the bids, that's something over eight cents a kilowatt
2 hour.

3 And the energy/capacity market rate
4 projection does not include the retail supplier price
5 premiums associated with providing a full requirement
6 service which also takes into consideration the
7 supplier's taking the volume of people leaving standard
8 offered service, and in fact, not coming back. There are
9 also ancillaries that are provided, that were provided in
10 that service. The supplier takes bad debt risk, which a
11 wholesale supplier wouldn't take. There is also a
12 reasonable allowance for retail margin.

13 And the other factors, if it's
14 different, which is when earlier standard offered service
15 contracts were executed when gas prices were
16 significantly higher than what they are today. And the
17 third difference, when you are looking at 2012, this was
18 an ICF projection that's lower than what current gas
19 costs are, and that's consistent with natural gas futures
20 market. So, if you take all of those, that explains the
21 budget.

22 The bid prices: The different projects,
23 they have different energy profiles that the load shape
24 have been significant resource. We have one that's
0960

1 primarily on beat, we have another base load resource,
2 and that was all considered in the analysis.

3 And the economic analysis, really, is a
4 composite of bid prices and energy market purchases and
5 sales.

6 The next slide looks at Total Score By

7 Project. According to this super category, you can see
8 Conectiv got approximately 69 points, Bluewater 57, NRG
9 significantly below that. I will briefly explain, as we
10 go into the different categories on the non-price
11 evaluation, Bluewater's, as might be expected, are doing
12 well, in favorable characteristic supercategory, having
13 very favorable environmental impacts, as well as fuel
14 diversity and technology innovation. And Conectiv had
15 established technologies that are well for those fuel
16 diversity and they came to the rear with NRG between.

17 It's the opposite with viability,
18 Conectiv using its established technology at different
19 sites worked very well for that; NRG and Bluewater using
20 technologies that are not as well developed and as we
21 talked specific concerns about Bluewater.

22 In terms of the economic evaluation,
23 Conectiv scored best, this is in dollars per megawatt
24 hour, levelize the 2005 dollars. They scored best and
0961

1 Bluewater and NRG were relatively close.

2 Our scoring, and I will explain why it's
3 different from Delmarva's, I think the biggest difference
4 was the NRG score. We used the whole price forecast that
5 was significantly lower than what Delmarva used and it
6 explains a lot of that difference.

7 The model that was used in the economic
8 analysis was ICF's integrated planning model. It's an
9 optimization model that, given the different levels of
10 load, tries to come up with optimal economic source of
11 energy and capacity. There are other models that are
12 inputted into that, natural gas, coal model, transmission
13 model. And the metric that was used is dollars per
14 megawatt hour. The standard offered service costs, using
15 2005 dollars for the period of time for the first year of
16 the first bid to the last year of the last bid, that's
17 the 2011-38.

18 We contemplated having a test bid, which
19 is like doing a test drive with the model and you can do
20 assumptions, you come up with some hypotheticals, you
21 ride it and you see if it makes sense, but there really
22 wasn't enough time to do that. And, so, instead, we had
23 a review process with Delmarva and ICF regarding the
24 inputs and the methodology.

0962

1 So we implied a standard of
2 reasonableness. We were, frankly, constrained by time,
3 and Delmarva has control over the assumptions in the
4 model.

5 We did find things that were, we thought
6 were unreasonable. We sought an additional model, which
7 was reflected in our analysis, and those items,
8 primarily, involved changes in coal and gas
9 transportation cost forecast, and how the one-time
10 adjustment in the Conectiv bid was evaluated. That's all
11 reflected in our report.

12 There were other adjustments made
13 regarding the renewable energy credits and imputed debt,
14 and that was done with outside of the model. That,
15 again, that's reflected in our report.

16 We will also be conducting additional
17 analysis, in the upcoming weeks, on the relationship to
18 the RFP and the bids in the IRP process.

19 The next slide is -- really shows, over
20 time, the wholesale costs with, for market supply case
21 and different bids. You can see Conectiv is closest to
22 the market case. And it's over a shorter time period and
23 it's smaller in terms of the capacity and it's smaller in
24 the amount of energy. The other bids are, over longer

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1 periods of time, larger.

2 Another factor that was considered was
3 price stability. It was tested across the reference case
4 and seven other scenarios for each bid, of all variations
5 of natural gas prices, carbon dioxide compliance costs,
6 coal prices and some other assumptions. The stability
7 was measured by taking the standard deviation of the real
8 levelized SOS costs across scenarios. And as one might
9 expect, Bluewater was the most stable and got all 20
10 points.

11 Conectiv was -- scored marginally above
12 zero because it's marginally more stable than market
13 purchases, and part of that reflects the smaller size and
14 the shorter term. The analysis was over a 17-year
15 period. This was analyzed over a ten-year period. There
16 was a five-year option, but it was -- it was perplex and
17 that was not separately analyzed.

18 NRG's bid scored zero because they were
19 less stable than market purchases, and that sounds
20 counterintuitive, but some of the variability is with the
21 carbon dioxide allowance costs that are passed through
22 analysis, the range of variability was 21, reflected in
23 the uncertainty of what that might be in the future.

24 So, the next slide is the Economic

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1 Supercategory Summary. Again, it shows that Conectiv
2 scored best on price, followed by Bluewater and NRG. In
3 price stability, Bluewater scored the best. Other
4 projects scored minimal points.

5 Exposure is the category that addresses
6 really the risk to Delmarva and the customers from taking
7 on contracts of this type. It's a function of contract
8 size, the term of the contract, and the operation of
9 flexibility. And in this category, Conectiv scored quite
10 highly and the others scored minimal points. They had
11 longer contracts of a larger size. And the bidders are
12 investment grade.

13 The last category is contract terms.
14 There really was not much differentiation in our
15 historical projects.

16 So, in terms of the total score
17 supercategories, what it really comes out to is Bluewater
18 scored very well on favorable characteristics, and most
19 of those points are environmental, if that makes sense,
20 and the next category, project viability, Conectiv scored
21 best, and, again, that makes sense to using conventional
22 technology at each site. And the last category,
23 economics, which was a function primarily of price and
24 price stability in which Conectiv scores best and

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1 Bluewater scores the second best.

2 And how do we compare the projects in
3 that filter? Conectiv has the best evaluated economics
4 based on the assumptions that are evaluated as being
5 modestly above market. They have the least risk, which
6 is why they scored well in terms of the exposure
7 category. They have relatively small size compared to
8 the other bidders, flexibility, operationally, and the
9 contract terms are significantly shorter than the other
10 bids, ten years compared to 20 or 25. They also provide

11 little more price stability, the way this is evaluated,
12 for some of the same reasons. They have strongest
13 viability. They are using conventional technology, and,
14 for the same reason, they scored poorly in terms of
15 technologically innovative.

16 Bluewater is environmentally superior
17 and provides price stability, but it is also expensive,
18 and it would evaluate it as being \$12 to \$13 per megawatt
19 hour over warranty, that would be on a levelized basis.

20 We had some questions regarding, on the
21 viability side with regard to the finance ability. In
22 their pro forma, they are assuming that they can sell
23 greenhouse gas credits and renewable energy credits and,
24 on a large scale together, and our assessment is it would

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1 be very difficult for them to obtain greenhouse gas
2 credits and there are issues about getting them and also
3 selling RECs, so that we look at sort of the financial
4 underpinnings of it being somewhat speculative, and
5 that's a concern we have. And then just generally
6 developing an offshore wind project which has not been
7 done successfully, and where the rules are still in the
8 process of being made, it raises some issues as well.

9 NRG, their proposal clearly is
10 technologically innovative. In the long terms, the
11 technology provides potential contribution for dealing
12 with greenhouse gas issues. On the other hand, it has
13 high fixed costs. There is significant CO2 compliance
14 cost exposure, particularly without the carbon capture
15 storage. It's a large size relative to the load, and
16 there is significant uncertainty regarding the ability to
17 do the carbon capture, carbon capture sequestration.

18 We also addressed in our report what we
19 considered to be major contract/risk allocation issues.
20 Really, this goes back to the process because if you are
21 decide to direct Delmarva to enter into a contract with
22 one of the bidders and there is a relatively short period
23 of time for the parties to negotiate a contract, we
24 thought it was important to give the parties some

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1 direction as to how some key issues ought to be decided.

2 And we note that all of the bids were
3 non-conforming to the FRP requirements that were

4 expected, but I would just sort of like to outline those
5 issues now.

6 Conectiv, they did not offer a second
7 lien as the RFP required. It was a nonnegotiable
8 contract term for financial security if there is a second
9 lien on the plant. They thought that that was
10 commercially unreasonable and should not be required. We
11 don't see any reason why they should not provide a second
12 lien as part of the RFP requirement, and the RFP also
13 says, being an affiliate of Delmarva, there are not
14 separate rules for them compared to the other bidders.

15 It also proposed that in the event they
16 are not able to obtain permits, that they would get their
17 security deposit back. We don't think that that's a
18 reasonable exception for contracts of this nature really
19 regarding technology like this that's relatively
20 straightforward to the existing side of the bidders to be
21 expected for that kind of risk.

22 A major concern that we have with regard
23 to the one-time adjustment in the price, and this
24 one-time adjustment that they are proposing would not
0968

1 take place until after the decisions were made and an
2 appeal period would run and then appeal after weeks, it
3 would be months or maybe even years after that, that that
4 -- that's really too much of a risk if you have a
5 one-time event that really would boost future prices up
6 in a significant way. So we think there needs to be some
7 limit or circuit breaker to that because this process was
8 supposed to help price stability, but there is an
9 inherent part of that proposal that's problematic and I
10 think there is a difference between a one-time event,
11 which can have a very long-term effect of a contract
12 price, as opposed to price adjustments that would take
13 place every month or quarter or year.

14 Now, there is good reason why they
15 wanted to do this because it's gas profits and they want
16 to provide price stability so they want to hedge part of
17 the gas prices. I think if the agencies wanted to go
18 forward with this project, there is an issue here that I
19 think needs to be addressed, in our opinion, to make this
20 acceptable.

21 And the other issue is the, to the

22 extent there is CO2 regulations, costs greater than those
23 -- there are costs that are greater than that inherent in
24 implementation of dredging, Conectiv is seeking the
0969

1 ability to pass those costs through. I think that that's
2 something that needs to be addressed, and probably, if it
3 were decided that would be acceptable, something that
4 would be structured in a more explicit way than as has
5 been discussed.

6 For Bluewater, there is an issue of
7 contract size that was addressed, I think, earlier when
8 Bluewater filed its motion. When we look into the
9 requirements of the RFP, you can sell energy and capacity
10 or unforced capacity requirements 400 megawatts of name
11 plate in capacity, Bluewater has proposals in which they
12 do that. But they also have other proposals in which
13 they want to sell the energy -- unforced capacity credits
14 from 600 megawatts of name plate capacity with 400
15 megawatt capacity.

16 I think what we have said on that, I
17 mean, it's non-confirming, but the, because the way they
18 priced it, 600 megawatt proposal is more attractive and
19 was evaluated better, so it's a question of if you wanted
20 to go forward with Bluewater, what are the benefits and
21 risks of doing that?

22 However, there is also an issue of the
23 amount of security as required. They have a theory that
24 the requirement for name plate capacity was really
0970

1 unforced capacity after the first year of the rules.
2 That's 20 percent of what the name plate capacity is. So
3 I think what they have said is that the amount of
4 security that they provide is really 20 percent lower
5 than I believe what the RFP requires -- excuse me, 80
6 percent lower, it's 20 percent of, and we don't think
7 that's acceptable, that they should -- should be able to
8 provide security that's required -- security requirements
9 for wind projects was adjusted to take into consideration
10 already that they provide less energy and unforced
11 capacity than other projects do already. And we
12 basically had a 60 percent reduction based on the
13 installed capacity basis to account for that. Bluewater
14 wants, basically, another eight percent reduction off

15 that. And for this magnitude of the size of project, we
16 would recommend against.

17 And with NRG, there are, I mentioned the
18 CO2 passthrough provision. They want also the ability to
19 get out -- get their security deposit back if they cannot
20 obtain the financing due to a provision in the contract
21 that would give Delmarva the ability, with the Commission
22 's approval, to terminate the contract if Delmarva's
23 auditor determined that NRG's finances would have to be
24 consolidated on Delmarva's books, and to get half the
0971

1 money back if they couldn't obtain financing for other
2 reasons. So, those are other issues and we have not
3 addressed those at this time to date.

4 In conclusion, the analysis shows there
5 is diversity of the proposal, gas project, we have got a
6 wind project, and a coal project. They really highlight
7 the tradeoffs between environmental benefits, technology
8 innovation, reliability, feasibility, cost impact on
9 ratepayers, and price stability. Based on the evaluation
10 conducted to date, we ranked the bids Conectiv,
11 Bluewater, NRG, in that order. We will be doing
12 additional analysis with our report that's due in April,
13 and the intent of that would be to provide framework for
14 the decision of the state agencies.

15 Thank you.

16 CHAIR McRAE: Thank you, Mr. Sheingold.
17 Before we move on to Delmarva's response, questions for
18 Mr. Sheingold?

19 Mr. Cherry.

20 MR. CHERRY: I just want to make sure I
21 understood something you said earlier about CO2 pricing
22 and passthrough requirements. Conectiv bid, for
23 instance, last week, if I heard you right, they had
24 accounted for cost of coal or carbon, rather, up through
0972

1 regular compliance, but if there was something more
2 rigorous or natural program that might drive the costs of
3 compliance up, they were opting to pass that through to
4 the ratepayers.

5 MR. SHEINGOLD: Right.

6 MR. CHERRY: And that is a
7 non-conforming aspect of this bid, is it not? We didn't

8 allow that in the RFP, did we?

9 MR. SHEINGOLD: That's correct.

10 MR. CHERRY: Recognizing it came in that
11 way, I am interested in what we get for our money.

12 In the Conectiv case, there is a dollar
13 above market; is that about right?

14 MR. SHEINGOLD: Pardon?

15 MR. CHERRY: In connection --

16 MR. SHEINGOLD: Roughly.

17 MR. CHERRY: About a dollar above
18 market.

19 Now, does that financial picture include
20 -- it doesn't include any additional carbon costs above
21 and beyond?

22 MR. SHEINGOLD: It does include. That
23 was considered in the analysis.

24 MR. CHERRY: I am sorry?

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1 MR. SHEINGOLD: It was included. It was
2 considered in the analysis. For all of the bids, we
3 considered CO2 compliance costs. And the reference case
4 is based on starting out with RGGI and then transitioning
5 to federal regulation, which is, basically, a
6 "probabilistic" assessment of different forms of proposed
7 legislation ultimately ending up with international
8 market price.

9 So, you know, one can look at this in
10 terms of compliance costs. The analysis is conclusive of
11 all CO2 regulation costs based on the assumptions made.
12 We work with the bidders to illicit specifically how this
13 would be treated after they made some broad exceptions.
14 And there are also additional points, non-price for
15 greenhouse gas emissions, so one could look at that as
16 saying, from a compliance cost standpoint, we have
17 treated CO2 emissions with respect to all of the bids,
18 the market situation, but there are also additional
19 points based on the CO2 emissions.

20 MR. CHERRY: So, then, so I understand
21 this --

22 MR. SHEINGOLD: The answer to your
23 question is the Conectiv bid and the NRG bid do include
24 what the estimated costs to the customers would be for

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1 passing through the costs associated with CO2 emission.
2 The market base assumes -- what is imbedded in the market
3 base is the cost of CO2 compliance.

4 So, we -- the attempt was to do an
5 apples to apples comparison. And trying to be
6 non-conforming, I would also add that it was not at least
7 nonnegotiable requirements. We have bids that are
8 non-conforming in different respects, and that's not
9 usual for an RFP process, but we endeavored to evaluate
10 the bids as they were bid but to make sure that we were
11 doing apples to apples comparison.

12 MR. CHERRY: So the same holds true for
13 NRG as well?

14 MR. SHEINGOLD: Yes.

15 MR. CHERRY: How they treated carbon
16 through various proposals.

17 MR. SHEINGOLD: Right. The issue is if,
18 for example, they were to assume the risk of CO2
19 compliance, there would be a rather significant price
20 bid. They would bid higher costs due to that. So,
21 instead, what they did was did a bid, a price premium,
22 take that, but on the other hand, they were fully
23 evaluated.

24 Now, it's your decision, should you go
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1 forward, want to go forward with either NRG or Conectiv
2 as to whether you would want to have such pass -- whether
3 you would want to accept such a passthrough provision,
4 but what we did was evaluated the bids as they were bid
5 but we tried to incorporate all of the potential costs.

6 MR. CHERRY: So the bid for Conectiv, or
7 your analysis of the bid for Conectiv, and, again, I am
8 going to use NRG -- I am going to go to NRG. NRG had an
9 interesting way of counting for carbon using what they
10 might see as allowances granted from the regulatory
11 agency for RGGI, and they then take a third of those
12 allowances, two-thirds of those allowances and dedicate
13 them to Delmarva.

14 MR. SHEINGOLD: Well, I sort of -- here
15 is how we did this: We really tried to elicit from NRG
16 whether they would be willing to essentially allocate any
17 load cost analyses they might be able to give to the coal
18 gassification plant. And since the Delmarva portion of

19 it is, of 600 megawatts, it seemed to be a reasonable
20 thing to do for --

21 CHAIR McRAE: Would you put the mic a
22 little closer? You are coming in lower.

23 MR. SHEINGOLD: It was the evaluators
24 who made some assumptions about, over time, the degree of
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1 federal regulation and how allowances may be allocated or
2 auctioned to units. So, there was an assumption that
3 they would be, and this was how Delmarva and consultant,
4 and I believe the analysis would be under RGGI, there
5 would not be allowances allocated, but under the federal
6 program, it would. And they would diminish over time so
7 that there, over time, there would be more auctioning of
8 allowances and less allocated.

9 MR. CHERRY: And that may very well be
10 the case, as time will tell, but if -- if they weren't
11 allocated and they were, in fact, sold or made available
12 on the market and NRG had to buy, would this price of
13 \$107 per megawatt hour hold true? Is it different
14 circumstances that laid that out in your report, or would
15 the price go up?

16 MR. SHEINGOLD: It would go up. I can't
17 say how much. But it's --

18 MR. CHERRY: I am trying to get a sense
19 for what we get for our money. Does it get us part of
20 the controls, you know, equivalent to what we might
21 expect in the real world or not? And I am still
22 struggling with that a little bit.

23 MR. SHEINGOLD: Right. There was some
24 sense to run low for carbon. You know, there may be some
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1 other cases that we may want to see involving different
2 combination of assumptions, but there was a low CO2 case.
3 There was also a higher CO2 case. And those were
4 considered also in the price stability.

5 MR. CHERRY: To switch topics for a
6 minute to market. The models that you and the other
7 consultants would run if suggested with market price,
8 this is going to be in the next 30 years, it's just
9 projection, though: What was the market price at the
10 height of the Katrina catastrophe?

11 MR. SHEINGOLD: It would be

12 significantly higher than today's prices or that are
13 being projected.

14 MR. CHERRY: So, what we have here is
15 some best estimate of what it might be over the next 30
16 years, ignorant, if you will, of real legerities in the
17 market and what could happen to market prices in the
18 future?

19 MR. SHEINGOLD: That's right. I think
20 one of the things that we said in our report that we
21 probably, for natural gas prices that tend to drive this,
22 we probably would have liked to have seen a more robust
23 set of assumptions in terms of prices being, you know,
24 more higher than more lower than the reference kit.

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1 MR. CHERRY: Can you explain to me, as
2 part of the report, it talks about the price, how the
3 points were allocated for the price. The lowest price
4 got 33 points scale and the highest price got a zero and
5 there were fixed in between that.

6 The report references a \$10 to \$15
7 range; in other words, in the lowest -- excuse me, if the
8 highest price was within \$10 to \$15 of the lowest price,
9 that was the approach that was used. Could you explain
10 for me where the \$10 to \$15 comes from, why that
11 technique was used, and the what ramifications are?

12 MR. SHEINGOLD: Typical weigh and points
13 score, you need a way of scaling the allocated points,
14 and I think Delmarva came in with a proposal to scale on
15 -- scale of bids based on the lowest bid and the highest
16 -- and \$10 megawatt above that. We thought that range
17 was too small. It was increased to \$15, and provisions
18 for how you would scale it, if the bids were less than
19 \$10, between high and low, or more than \$15, but the \$15
20 was based on our view that that would be more likely to
21 be a range, which turned out to be closer to what we
22 actually got, at least that's the way we assessed it.

23 CHAIR McRAE: I just want to clarify
24 when you speak of "our," "our view," I don't know if this

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1 is my view of your discussion between Delmarva, because I
2 know you did have periods where you agreed on assumptions
3 and some not, so when you say "our view," that --

4 MR. SHEINGOLD: I am referring to our

5 consultant again.

6 COMMISSIONER CLARK: Just, I mean, I
7 know Delmarva has, their consultant hadn't gone through
8 the report yet, or Delmarva hasn't, but they have
9 estimates, ranging estimates of additional costs on
10 customers ranging from 100 million to about, I believe it
11 was about four billion depending on which bid is
12 accepted.

13 Will you -- do you have an estimate
14 available, or will you, by April 4, as to the accuracy of
15 that?

16 MR. SHEINGOLD: Yeah. I think the
17 numbers that we have given are sort of dollars per
18 megawatt hour, but we can convert that in terms of total
19 dollars. And I think in our additional work, you know,
20 we may have provisions for here as well.

21 COMMISSIONER CLARK: Is it just when you
22 compare -- is it part -- on your summary, there were a
23 few things. One, you said it was kind of an apples to
24 oranges position when you talked about our current SOS
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1 market price rates 11.1 cents.

2 MR. SHEINGOLD: I tried to explain that.

3 COMMISSIONER CLARK: Versus what these
4 estimates entail, I mean, but then the chart on page 12
5 went right along with that. I don't understand -- I
6 mean, I guess is it a useful tool to look at but keeping
7 the problems with an apples to oranges comparison in
8 mind?

9 MR. SHEINGOLD: In terms of the way of
10 the modeling that was done -- it was basically an
11 analysis of the wholesale inputs of -- that go into a
12 retail price, but there are other elements as well, and
13 one of the primary elements is that the retail supplier
14 is providing a fixed requirements service to supply all
15 the customers across their load at a fixed price for up
16 to a three-year period. And it's taking the volume, if
17 customers migrate, if customers come back on, they are
18 taking that risk, and there are some other cost elements
19 as well. And there are some market price differences
20 based on the different time periods of when those
21 contracts were entered into, the time period that we are
22 talking now, and even between now and the time period

23 with -- when the bids were first coming in.

24 So I tried to explain what those

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1 differences were. But in terms of looking at energy and
2 capacity wholesale costs in the way of doing this
3 analysis, I think that is correct. You may have some
4 differences with Delmarva about whether contracts that
5 would be entered into from different municipals would
6 provide some hedge value. You know, we think it would.
7 It's difficult to quantify. We may address that in our
8 next report.

9 But I hope that answers your question.

10 COMMISSIONER CLARK: It does. Thank
11 you.

12 I would like, at some point in time, if
13 you would get together just a response in total dollars
14 paid by customers, an estimate in line with what Delmarva
15 had. As time goes on, I know it's not --

16 MR. SHEINGOLD: Yeah. We can do that.

17 COMMISSIONER CLARK: I know, as time
18 goes on, bidders, when they have their chance to respond,
19 they should do the same thing.

20 CHAIR McRAE: Just on the subject of
21 hedging, the hedge value, was that a factor in your
22 establishing rate stability, that this hedging would
23 occur having ultimate impact on when natural gas prices
24 landed over time?

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1 MR. SHEINGOLD: I think that looks at
2 the standard deviation price. I don't think that that's
3 something that specifically was addressed for that
4 analysis.

5 The only thing that I have seen, and I
6 don't have this impression in mind, but there was some --
7 in Maine where they have auctioned off contracts that
8 they have, unit contracts similar to these. At the same
9 time, they are doing requirements, purchases for standard
10 offer service where they give parties the ability to
11 either bid on one or the other or combined experience as
12 they are getting better deals, pricing where someone
13 provided requirement services also taking on a unit
14 contract because it provides some hedge for them.

15 And, so, they are getting pricing, but I

16 -- maybe that's something we can look at, you know, in
17 our next report.

18 CHAIR McRAE: I was specifically
19 requesting that you do that.

20 Are there additional questions?

21 MS. COHAN: My questions will be very
22 generic. Earlier, you mentioned several times, not just
23 today, in previous conference calls, the issue about the
24 test bid.

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1 Do you think your opinion on that,
2 because you mentioned that there was maybe not as much
3 due diligence on the numbers as you would have liked, I
4 can see you squirming when you are talking about that,
5 that you didn't have time to do that, so, do you think
6 that the outcome would make a difference?

7 MR. SHEINGOLD: I think we would have
8 liked to do test bids, which is why we proposed it, but I
9 think we recognize that it's not feasible to do in the
10 time period.

11 I think we will have some additional
12 time, and in our additional work to go back and look at
13 things that, you know, appear to us that may not have
14 been done directly, although our focus is going to be
15 looking at the IRP and RFP relationship. And I think
16 also we did some -- some of the major components, such as
17 gas prices and coal prices, we looked at the futures
18 market, direct prices, to see how the estimates where the
19 future market was an indicator of reasonableness, and we
20 also compared to it some of the forecasts, other
21 forecasts for the information in this range.

22 And, so, you know, we did that. In
23 fact, some of the assumptions we found to be
24 unreasonable. We didn't get an additional model run

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1 done. So it was not a perfect process, but we also -- we
2 will be addressing some of these in an additional report.

3 MS. COHAN: One more additional
4 question. I just want you to help me understand a little
5 bit, and please use terms that I can understand, the size
6 issue, just a cursory review in looking at though
7 Conectiv had -- it was a smaller project, their viability
8 numbers were a little higher, because of the new

9 technology and a smaller contract period, how did you --
10 and you mentioned apples to apples several times, how can
11 you explain to me in terms that I can understand how you
12 managed to do that?

13 MR. SHEINGOLD: In terms of the Conectiv
14 proposal?

15 MS. COHAN: Comparing it to the other
16 two proposals, the shorter contract.

17 MR. SHEINGOLD: I think what the shorter
18 contract period, the analysis assumes that, at the end of
19 the contract period, that Delmarva will just purchase
20 from the market, so to the extent all of the projects
21 were evaluated as being above market, the one that has
22 the smaller size, that's the 200 megawatts, the energy is
23 mostly on beat, is going to -- and has a shortened term,
24 is going -- will score better.

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1 In terms of the exposure category which
2 deals with risk to Delmarva, if you have got a shorter
3 term contract, a smaller size, you have more operational
4 flexibility, you are going to score better than the other
5 projects.

6 On the other hand, they don't provide
7 much in the way of fuel diversity. They don't provide
8 much in the way of price stability. Although, I think,
9 if you look at that in the shorter time period, it may be
10 better.

11 So, they don't score -- well, for
12 technological innovation, but this really shows the
13 tradeoffs in the considerations that one would make in
14 making any major decision on energy project.

15 CHAIR McRAE: I think it might be
16 helpful with respect to that question to -- around the
17 fact that the larger the volume, you have to do something
18 with that quantity commitment which has some financial
19 implications, and, of course, as you span the time frame
20 of an agreement, you are dealing with even greater
21 service because in 25 years, you are putting things that
22 could happen that may not as likely occur in ten. So I
23 do think there is some number components to that that
24 maybe wouldn't get in the detail of, but as a part of

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1 looking at that, the capacity is a course particularly if

2 you have to deal with excess.

3 MR. SHEINGOLD: I just want to say that
4 the analysis, the economic analysis did consider when
5 there was more energy than necessary to make the load
6 than it was sold to market prices so that the analysis
7 does take into consideration that issue.

8 MR. SCOGLIETTI: Just a quick question.
9 Jennifer and I happened to be in another discussion last
10 week on similar issues. We were made aware of, I guess,
11 tell me if I am wrong, maybe it's incorrect terminology,
12 but of a pending issue before FERC with regards to
13 capacity charges, I believe, and essentially those states
14 that, in the region that tend to suck in more electricity
15 than others will be adversely affected versus those who
16 tend to generate more.

17 And I guess my question in the context
18 of this RFP is whether the base case, i.e., just current
19 market, whether that -- whether there are allowances made
20 for that, or how it was done, washing through the other
21 three bidders?

22 MR. SHEINGOLD: I think you are
23 referring to the PJM's reliability planning model that I
24 believe was approved in December by FERC. And, you know,
0987

1 it's not explicitly included that. I think one of the
2 questions that we had in the earlier parts of the
3 analysis is whether capacity prices might need to be
4 increased to reflect that ruling. So that's how I am
5 thinking we then may address FERC.

6 CHAIR McRAE: Excuse me. Can you repeat
7 the answer, Barry? Volume. About capacity for your
8 interest to imply to, the FERC decision and how that
9 could be done.

10 MR. SHEINGOLD: What I was saying is in
11 the earlier part of the analysis, that we would want to
12 follow-up in terms as to whether capacity prices that
13 were estimated on the adjustment upwards --

14 CHAIR McRAE: Did you hear that? Turn
15 to me and tell me.

16 MR. SHEINGOLD: One of the matters that
17 we are going to look at is, during the earlier period of
18 the analysis, whether capacity prices in the estimated
19 market values ought to be adjusted upwards taking into

20 consideration the RFP.

21 CHAIR McRAE: Very good.

22 MR. CHERRY: We will come back in a
23 second to the Conectiv bid. I guess since there are an
24 alternate bid, you said in this report as well, that --
0988

1 is it their option where they get that power?

2 MR. SHEINGOLD: Yes.

3 MR. CHERRY: It's in the alternative
4 bid?

5 MR. SHEINGOLD: Yes.

6 MR. CHERRY: So, how did you rate that
7 when, in fact, it may not be a natural gas fire unit
8 that's combusting and emitting to meet that load? It
9 could be a coal plant that's combusting and emitting?
10 And how could you have possibly rated that on several of
11 the factors when you don't know where the power is coming
12 from?

13 MR. SHEINGOLD: Well, based on the
14 pricing and the economic analysis that most of the energy
15 would be purchased during on peak hours or natural gas in
16 the margin, so we thought it would be a reasonable
17 assumption they could either come from the unit or a gas
18 plant, or even if it came from a coal plant, the marginal
19 unit would be a gas plant. So, for emission purposes and
20 for scoring purposes, we used, and economic analysis
21 purposes, we'd use the particular unit.

22 CHAIR McRAE: Are there further
23 questions for Mr. Sheingold? If not, I will move to
24 Delmarva.

0989

1 MR. FINFROCK: Thank you, Madam Chair,
2 Commissioners, and other state agencies. My name is Mark
3 Finfrock. I am the director of corporate risk at
4 Delmarva Power, and I am the project lead with -- in
5 respect to this RFP.

6 I am hopeful that the state agents have
7 a copy of the presentation. I will work as hard as I can
8 not to be redundant to what Barry -- Mr. Sheingold
9 addressed, but as you can see from the first bullet on
10 page --

11 CHAIR McRAE: Do you have -- I must not
12 have it? Oh, here it is. I am with you now.

13 MR. FINFROCK: As I was saying, I will
14 work very hard not to overlap what the independent
15 consultant presented, but as you can see from the first
16 bullet on page 2, that there is a lot of similarities and
17 consistencies between Delmarva's independent evaluation
18 and the independent consultant's evaluation.

19 Even in the case that the independent
20 consultant used different input assumptions with respect
21 to fuel prices, renewable energy credits, and things like
22 that, and also independently assessed the non-price
23 factors, we were very consistent with the scoring
24 outcome. So, our ranking of bids is very similar.

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1 However, and we have the highest rank bid, which is
2 Conectiv.

3 However, what we don't have is a most
4 favorably. And what I mean by that is favored with
5 respect to what the intent of the legislation was that we
6 feel would suggest to our customers as the prudent option
7 to service the load requirement of our SOS customers.

8 So, we didn't deliver -- it did not
9 deliver the benefits that we deemed appropriate from the
10 legislation, and there is significant risks that couldn't
11 get adopted into the evaluation that would suggest that
12 we wouldn't want to consider one of these relationships
13 for supplying that service.

14 On page 3, quickly, it is just a,
15 really, on the table that was in our evaluation report
16 that looks at the overall bid evaluation, and we broke
17 that bid evaluation between non-price, as Mr. Sheingold
18 spoke of, exposure, contract terms, price, and price
19 stability.

20 Again, this is just to reflect that we
21 are consistent with the independent consultant even
22 though they relied on a different set of input
23 assumptions and they independently assessed the non-price
24 factors.

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1 On page 4, a question came up to verify
2 the numbers that are presented on the first row of this
3 -- of the table that's at the bottom of the page, which
4 reflects the incremental costs to customers of what it
5 would cost out of pocket to fund the SOS supply service

6 to those customers with a particular bid in the mix of
7 supply options. And that equates to roughly one to \$200
8 million for Conectiv, roughly \$2 billion for Bluewater,
9 and \$4 to \$5 billion for NRG.

10 And what this reflects is if you assume
11 the costs to customers with no bid in the mix of that
12 service, and then you enter a bid into that mix, what is
13 the incremental cost? And we offered to you those
14 numbers to compare the difference between a reference
15 pace, which is an almost current method of serving, we
16 basically serve from the market today, and we assume that
17 as our reference case, and what would be the incremental
18 costs of that reference case if you selected a bid as one
19 of the mix of servicing customers.

20 With respect to price stability, we felt
21 the price stability and price are kind of commingled. We
22 believe the Act desired a cost effective service that
23 provided price stability. You can see here, on this
24 table, that many of these bids are very expensive for
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1 customers and they provide a little stability,
2 incremental price stability to customers other than the
3 market.

4 For example, Bluewater, we classified
5 Bluewater as a number of different bids, but Bluewater
6 North, 25-year contract, only reduced the variability to
7 customers by 36 percent. That means 34 more percent of
8 the variability the customers would see in servicing 100
9 percent of the market, 64 percent of it would still
10 reside with the customer. So we don't see significant
11 reduction in price variability or achievement of price
12 stability with these bids. And we are also recognizing
13 significant costs to enter into these relationships when
14 we desire some stability coming out of them, and we did
15 not achieve that.

16 Page 5, what we wanted to do is provide
17 a backdrop, once again, on the size of the load that we
18 are talking about. We referred to this table, it is our
19 2005 load duration curve, which reflects, from left to
20 right, the amount of load we are serving on a peak hour
21 going down to, from left to right, to the -- an hour of
22 the day that we served the least amount of load, the hour
23 of the year.

24 Delmarva services three jurisdictions,
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1 and that entire load has a peak hour of over 4,000
2 megawatts.

3 The Delaware load, just the Delaware
4 load is over 25,000 megawatts. The DP&L, or the Delaware
5 and Delaware retail load back out communities is
6 approximately 2000 megawatts. And if you step down, you
7 will get to the SOS residential small commercial load
8 that we are speaking of servicing through these bid
9 relationships. And that number is fairly insignificant
10 -- that number, relatively speaking, is insignificant in
11 size compared to the load on the Peninsula.

12 And our point here is that we are asking
13 a very small subset of customers to fund significant
14 costs to servicing a new generation facility that may
15 benefit a larger population of customers, environmental
16 benefits or other benefits. And that relationship
17 doesn't sit well with respect to the size of the
18 facilities, especially the two large bids, and the load
19 that it's serving.

20 I also want to say that if you -- we can
21 predict this out to 2015. We don't have the details of
22 the total Delmarva zone load, but the 70 percent of the
23 Delmarva SOS residential small commercial load that has
24 an average of 289 megawatts in 2005 would ramp up to an

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1 average of 313 megawatts in 2015. Still a fairly
2 insignificant size of load related to the size of the
3 bids through this RFP process.

4 And those numbers are consistent with
5 what we have seen from PJM with respect to their load
6 forecast on the Delmarva Peninsula, and they also, with
7 that load forecast, suggest that there is no generation
8 need through 2011 on the Peninsula.

9 Page 9 picks a year that all the bids
10 were reviewed under, which is, again, 2015, and it deals
11 with the issue of over and under supply. The current
12 auction process --

13 MR. WILSON: Page 6.

14 MR. FINFROCK: Page 6, the current
15 auction process supplies energy consistent with the need
16 of the load. The orange line on this chart is the load

17 projected out for 2015. Under the current SOS option
18 process, the supply would fall right on top of that load
19 lead. All of the risk of usage by customers falls on
20 suppliers.

21 Under the bid process, what we have done
22 -- what we have shown here is, and we have shown it at --
23 we have picked hours of the day that are typically the
24 load usage hours, so it would reflect a more concerning
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1 period of time with respect to the over supply of some of
2 these bids. So, if you picked midnight to eight a.m. on
3 what's the average load our customers, through the course
4 of a year, and then compare that to the megawatts that
5 are going to be served for this bid process, you will see
6 any time that the -- that the generation bid amount is
7 above the orange line, you are being over served. And
8 the company would have to do something with that power.

9 They would have to likely sell that
10 power into the market on off -- on off peak hours, which,
11 typically, has a lower price if you look at a price curve
12 for a given day.

13 In addition, there is hours where the
14 load wouldn't be sufficient to service customer need, and
15 we'd have to go out to the market and purchase that
16 additional requirement. All this comes into play in the
17 economic evaluation, and it plays out in the price
18 stability component, that is the resulting concern that
19 we had with these contracts.

20 On page 7, I want to speak quickly to
21 the long-term contract risks that were not picked up in
22 the evaluation process. These are additional risks that
23 we see customers potentially having to bear that we
24 cannot break down into the evaluation and we did not
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1 break down into the evaluation, the technology risk.

2 Two of the technologies that were in the
3 bids were arguably kind of first timers with respect to
4 the size. A scale of the bid were significantly larger
5 than anything in operation currently. Bluewater's wind
6 farm, there is not a wind farm in -- off any coast of the
7 United States. One could argue this is a hurricane prone
8 area and we don't know what that could do to this
9 technology. So, there is not a history. My point is

10 there is not a history.

11 With the IGCC, the plants that are in
12 operation today are project designs. They are small
13 scale. They are likely funded by governments for
14 testing, so there is not a full history and knowledge of
15 the operating performance of these facilities. And that
16 is a concern. We couldn't properly evaluate that type of
17 concern when we did an evaluation, but we want you to
18 recognize that there is a concern.

19 We also have a default risk, as any
20 long-term contract would have, and, again, that default
21 risk wasn't captured in the evaluation process.

22 Also, what we did not adjust in the
23 price stability assessment and the scenarios that we ran,
24 we did not adjust usage behavior of customers. We

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1 assumed a static model of what usage would be. Any time
2 that usage changes, that creates variability to the -- to
3 the customers because it would be more of an over supply
4 issue or more of an under supply issue depending on where
5 we are in the given day and how the supply is fed to it.

6 So, there are concerns that we have in
7 addition to what we have already seen as a result as load
8 price flexibility as an outcome of the bids.

9 In conclusion, we recognize that there
10 is still a -- there is still a process that we are going
11 to proceed with. We don't feel, however, though, that
12 any of these bids should -- the company doesn't see any
13 of these bids as favored to the point that we would enter
14 into a contractual relationship with as it did not --
15 they do not achieve the objectives of the Act. Very
16 little price stability at very high costs, and while
17 there is an environmental benefit to the Bluewater bid,
18 that benefit probably wouldn't span not just the SOS
19 residential small portion customers but a broader set of
20 customers and we would be asking a very small subset of
21 those customers to pay for that cost.

22 That's all I have. I will make one
23 comment to a question that Mr. Sheingold got on the
24 passing pricing and rpm, should we adjust our price with

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1 respect to the FERC ruling? The way we model capacity
2 price is we assumed capacity prices would increase to

3 reflect the cost of new entries into the market.

4 So, and we also assume that that's how a
5 liability pricing model will ultimately play out, that it
6 will set the price to allow new interests to the market.
7 There might be some adjustment there where we will argue
8 that we have reflected the right capacity prices going
9 forward because we modeled what it could cost for new
10 interests to participate in the capacity market and build
11 the facility.

12 That's all I have.

13 COMMISSIONER WINSLOW: Madam Chair. You
14 indicated that the SOS customers would not need
15 generation until 2011. How long does it take to get a
16 plant into service?

17 MR. FINFROCK: I will say that the PJM
18 looked out only that long of a period of time. It's not
19 determined that they will need capacity beyond 2011.
20 It's just that PJM has only looked out that far.

21 Obviously, it takes a number of years.
22 A coal facility would take five years and other
23 facilities would take less of the time, but the point is
24 that during the time arised that PJM has looked to the
0999

1 capacity need for reliability, there is no suggestion
2 that there is a need for capacity in the -- on the
3 Delmarva Peninsula for reliability.

4 COMMISSIONER WINSLOW: And, also, there
5 has been some suggestion -- you were, actually, I guess,
6 giving us a fourth alternative, it's three bids and this
7 fourth bid, I guess. It's also -- we have been given
8 some documents from a legislator that indicated that
9 there is another reason why we don't have a bid, that's
10 because we can buy the appropriate appliances and
11 monitors and smart readers.

12 Is that a viable 100 percent solution to
13 what you see as the future needs of the -- obviously,
14 there is something has to be done, I am not minimizing
15 that, but do you see that as an alternative?

16 MR. FINFROCK: Yes. Being consistent
17 with the integrated resource plan which assessed all the
18 alternatives that service our customers, at -- the most
19 effective costs to serve those customers, demand side
20 management programs weren't part of that resource mix,

21 so, yes, that's a valid alternative from a cost
22 standpoint to service at load.

23 COMMISSIONER WINSLOW: By the way, the
24 my last comment, and that is that Mr. Wilson and yourself
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1 and the whole team over there has very consistently
2 pounded some of these small funneled ideas into our
3 heads, and we have not forgotten your comments.

4 CHAIR McRAE: You were mentioning there
5 has been no suggestion of a need for capacity on Delaware
6 Peninsula.

7 Does that have to do with PJM's current
8 "artech" process and looking at planning transmission and
9 capacity?

10 MR. FINFROCK: Yeah. This was a study
11 that came out late last year, so when you say "current,"
12 they were assessing the -- for reliability purposes only,
13 the need for capacity on the Peninsula. And their
14 results indicated there wasn't a need for new capacity
15 given the import capability that's in and on the
16 Peninsula.

17 CHAIR McRAE: Reliability only versus
18 economics?

19 MR. FINFROCK: Reliability only.

20 COMMISSIONER WINSLOW: Madam Chair,
21 thank you. There was one thing that does bug me, to be
22 frank with you, about this whole process, and that is
23 that Delaware is a pretty doggone small state when you
24 give a graft about what percentage of electricity we use
1001

1 on the Delmarva Peninsula. I guess my question to you
2 is: If you are planning something like this, a new
3 generation, especially given the size of some of the
4 proposals, wouldn't it be completely helpful to have a
5 more larger region to look at in terms of who is going to
6 pay for this and how it's all going to be done? What
7 would you suggest in the event that option No. 4 or 5 was
8 selected and we do need generation, what could you
9 foresee of that?

10 MR. FINFROCK: That's a tough one to
11 answer. I will say that even on our current SOS process,
12 for example, there is a renewable obligation. We would
13 love to have more access to renewable energy on the East

14 Coast. The question is: Who is going to fund that
15 significant and potential needs of that resource? Our
16 position has always been: It should be the small handful
17 of customers in Delaware.

18 So, we do believe there is a need, and
19 the question is: Is it a multi-state process? I don't
20 know, and it's not my position to make that call. But we
21 are not against the -- the growth in renewable projects,
22 for example.

23 CHAIR McRAE: Commissioner Clark.

24 COMMISSIONER CLARK: In furtherance of

1002

1 this law that you have that I think your point was to
2 address the issue of minority of Delaware consumers
3 funding what could be a premium incremental cost and
4 accepting one of these bids, do you have an estimate, I
5 mean, I see it on your load serve, of what percentage of
6 Delaware consumers fall under our SOS contracts now? 40
7 percent?

8 MR. FINFROCK: We have roughly 250,00
9 customers, 250,000 customers. I don't know.

10 COMMISSIONER CLARK: I am just curious
11 because, I mean, that's --

12 MR. FINFROCK: It's -- it's a
13 significant portion of the residential -- it's a small
14 commercial -- I would have a hard time.

15 COMMISSIONER CLARK: I think your point
16 of this was, I mean, these SOS customers, through these
17 PBAs, would be funding this expansion, and, for instance,
18 Delaware co-op customers wouldn't be, municipal customers
19 wouldn't be?

20 MR. FINFROCK: That's correct. And by
21 the slide that I showed you where there is many hours of
22 over supplying from this resource, I believe some other
23 need, either the co-op or community, are going to be
24 purchasing that energy. So there is additional proof to

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1 the fact that this is a larger facility than is needed by
2 those customers.

3 COMMISSIONER CLARK: And the reliability
4 study that you cited from late last year, did that
5 include, as an assumption, the Mid Atlantic waste project
6 that came across the Chesapeake?

7 MR. FINFROCK: I will have to look at my
8 consultant. Did it include map project of the liability?
9 No, it did not.

10 COMMISSIONER CLARK: So that's
11 independent of that?

12 MR. FINFROCK: That's correct. That is
13 correct.

14 COMMISSIONER CLARK: Thank you.

15 MR. CHERRY: Thank you. I should have
16 asked this, I suppose, of Barry, but you are at the
17 podium and it's on your slide. It's really just out of
18 curiosity. I am on page three of your slide. Under
19 price, Bluewater Wind North is 4.8. Bluewater South gets
20 quite a few points fewer.

21 What's the difference in Bluewater North
22 versus South and why did the South proposal not fair as
23 well?

24 MR. FINFROCK: Less energy. Less
1004
1 energy.

2 MR. CHERRY: Less wind?

3 MR. FINFROCK: Less wind.

4 MR. CHERRY: Another question: The ICF
5 IPM model, when you granted 600 megawatts of wind
6 offshore, what impact did that model run have on the
7 capacity or output at the existing NRG facility?

8 MS. SCHELLER: Maria Scheller with ICF
9 Consulting representing Delmarva. The wind output likely
10 would not have had the -- and I don't know the specific
11 answer -- but likely would not have affected the output
12 of the current coal facility given that gas is on the
13 market quite frequently. The coal facilities tend to
14 undercut those units and dispatch first, so I don't
15 expect it would have had a significant impact in the
16 Indian River output.

17 MR. CHERRY: Thank you.

18 CHAIR McRAE: Do we have additional
19 questions? If there are no additional questions, and I
20 have to say I am sure the competitors have thoughts on,
21 and even responses to some of the questions that were
22 raised, they have tempered their behavior mindly, but I
23 will say, and I did mention that there would, indeed, be
24 opportunity for comment on the RFP evaluation reports and

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1 that we have a date of March 23rd for bidders to submit
2 written comments, and I think there are -- I gave other
3 dates, I do have this paper that sets forth the various
4 occasions for bidders to come and certainly can be
5 present at the public comment sessions where people will
6 certainly have interest in some of these matters.

7 Mr. Myers, are you twisting that because
8 you want to speak?

9 MR. MYERS: No. Not now.

10 CHAIR McRAE: I just thought you were
11 preparing to speak. So, I mean, this, of course, is not
12 the end of the dialogue, and I do appreciate the fact
13 that you have been patient with the process. I mean, it
14 was, more or less, to understand what was read in the
15 report, and there is also a recognition that the
16 consultants may not see the world on the same ways of the
17 bidders because you are close to your information. So I
18 would expect that we would hear some further inputs at
19 some point in time there.

20 I don't believe there is any other
21 business related to that if we are finished with the Q
22 and A. So, we are going to put this matter aside at this
23 time.

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1 C E R T I F I C A T E.

2 S T A T E O F D E L A W A R E:

3 :

4 N E W C A S T L E C O U N T Y:

5 I, Renee A. Meyers, a Certified Realtime
6 Reporter, within and for the County and State aforesaid,
7 do hereby certify that the foregoing hearing was taken
8 before me, pursuant to notice, at the time and place
9 indicated; that the hearing was correctly recorded in
10 machine shorthand by me, to the best of my ability, and
11 thereafter transcribed under my supervision with
12 computer-aided transcription; that the foregoing hearing
13 is a true record of the testimony given, to the best of
14 my ability; and that I am neither of counsel nor kin to
15 any party in said action, nor interested in the outcome
16 thereof.

17 WITNESS my hand and official seal this 29th day

17 of February A.D. 2007.

18

19

20

RENEE A. MEYERS

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21

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